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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

CHARLES E. WILSON, SECRETARY OF DEFENSE, JOHN FOSTER DULLES, SECRETARY OF STATE, WILBER M. BRUCKER, SECRETARY OF THE ARMY, GENERAL MAXWELL D. TAYLOR, HEAD JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE, MAJOR GENERAL W. H. MAGLIN, PROVOST MARSHAL GENERAL, UNITED STATES ARMY, GENERAL LYMAN LEMNITZER, COMMANDING GENERAL, FAR EAST COMMAND, PETITIONERS

v.

WILLIAM S. GIRARD, UNITED STATES ARMY SPECIALIST 3/C

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Attorney General and the Solicitor General, on behalf of Charles E. Wilson, Secretary of Defense, and the other petitioners, respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the above case pending in that court on the appeal of petitioners herein.

OPINION BELOW

The opinion of the District Court has not yet been reported. It is reproduced in Appendix B, *infra*.

JURISDICTION

The order of the District Court denying the petition for a writ of habeas corpus but granting declaratory relief and an injunction against petitioners was entered on June 18, 1957 (Appendix B, *infra*). A notice of appeal to the Court of Appeals for the District of Columbia was filed on June 18, 1957, and the appeal was docketed in that court on the same day. The case has not been heard, submitted to, or decided by the Court of Appeals. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Rule 20 of the Rules of this Court.

QUESTIONS PRESENTED

Japan and the United States have entered into an arrangement under which the United States may exercise court-martial jurisdiction within Japan over certain offenses committed there by American servicemen, but may also decline to exercise its right to try such offenses and may remit the serviceman to a Japanese trial for violation of the local law. In this case, the United States has declined to exercise its right to try respondent by court-martial, and is prepared to remit him for trial under Japanese law. The question presented is:

Whether a United States court should review and reverse the decision of the Government that re-

spondent should not be tried by court-martial and that the Japanese courts may try him for conduct in Japan resulting in the death of a Japanese national.

TREATIES, AGREEMENTS, AND STATUTES INVOLVED

Paragraph 3 (c) of the Protocol amending Article XVII of the Administrative Agreement under the Security Treaty between the United States and Japan reads as follows:

> If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

The full text of the Protocol and of the Security Treaty and excerpts from other relevant documents are reproduced in Appendix A, *infra*.

Article 14 of the Uniform Code of Military Justice, 10 U. S. C. (Supp. IV) 814, provides in pertinent part:

> (a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.
>
> * * * * *

Article 5 of the Uniform Code of Military Justice, 10 U. S. C. (Supp. IV) 805, provides:

> This chapter applies in all places.

28 U. S. C. 2241 provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *
>
> * * * * *

STATEMENT

On January 30, 1957, members of a United States military unit in Japan were engaged in exercises involving live ammunition. Because of the large number of Japanese civilian nationals present in the area, live ammunition was withdrawn and blank ammunition substituted. During an interval in the maneuvers, respondent Girard, a Specialist 3rd Class (equivalent to sergeant), and another soldier, one Nickel, were ordered to guard a machine gun and some field jackets that had been left on the far side of a hill.

Girard had a grenade launcher on his rifle. He had been armed with the same weapon during the morning exercises in which he had participated and during which he had fired some 80 rounds of ball ammunition. After the two soldiers had arrived on the ridge, Girard, on two occasions, placed an expended .30 calibre cartridge case in the grenade launcher and projected it by firing a blank. The second shot struck Mrs. Naka Sakai, a Japanese woman, who had been gathering expended brass

cartridge cases. The casing penetrated her back and caused her death.

There were conflicting accounts of the circumstances of the shooting. Some witnesses stated that the soldiers had thrown brass casings onto the ground and indicated that it was all right for the civilians to pick them up. Whatever the true facts, the Government has agreed that, for the purposes of the present stage of this litigation and only for that purpose, the killing may be deemed to have arisen out of an act done in the performance of official duty—as contended by respondent.

On February 7, 1957, Girard's commanding officer filed a certificate of official duty with the local Japanese authorities, *i. e.*, a certificate that the killing had arisen out of an act done by respondent in the performance of his official duty. Two days later, the local Japanese authorities notified the United States commanding officer who had issued the certificate that they considered that proof contrary to the certificate existed. The matter was referred to the Joint Committee which was established by Article XXVI of the Administrative Agreement (Appendix A, *infra*, pp. 18a–19a) under Article III of the Security Treaty between the United States and Japan (Appendix A, *infra*, p. 11a).

In the Criminal Jurisdiction Subcommittee of the Joint Committee, to which the matter was referred, both countries agreed that the killing of the Japanese woman was an offense against Japanese law as well as an offense against United States military law, and that, therefore, under Article XVII of the Adminis-

trative Agreement (as amended by the Protocol signed September 29, 1953) (Appendix A, *infra*, p. 23a–25a) the two countries had concurrent jurisdiction. The United States took the position that the offense was one

> arising out of any act or omission done in the performance of official duty,

and that therefore this was a case in which the United States had the primary right to exercise jurisdiction, as provided in paragraph 3 (a) (ii) of Article XVII (Appendix A, *infra*, p. 25a). Japan took the position that the offense was *not* one arising out of an act done in the performance of official duty and that therefore Japan had the primary right to exercise criminal jurisdiction.

The issue continued unresolved by the Joint Committee from early March until mid-May 1957, when the United States authorized its representatives on the Joint Committee to agree that Japan could exercise jurisdiction over respondent. It was agreed in the Joint Committee that United States military authorities would notify the appropriate Japanese authorities, in accordance with paragraph 3 (c) of the Protocol amending Article XVII of the Administrative Agreement, that the United States had decided not to exercise jurisdiction in the case. This action was thereafter taken. The certificate of official duty has not been withdrawn.

The decision of the United States not to exercise jurisdiction over respondent and to agree that Japan could exercise criminal jurisdiction over him was re-

viewed by the Secretary of Defense and the Secretary of State who concluded that it should be carried out. This decision was approved by the President. Public announcement of this determination was made, and it was communicated to the Government of Japan.

Respondent was thereafter indicted by Japan for the offense of causing a death by wounding, the least serious homicide charge for which he could have been indicted under Japanese law.

On June 6, 1957, respondent filed this petition for a writ of habeas corpus in the District Court for the District of Columbia. On the same day that court entered an order directing petitioner Wilson and others to show cause why the writ should not issue. It was further ordered:

> * * * pending hearing and determination of this application that the person of the Petitioner, William S. Girard, be not delivered to custody or control of any foreign government or power.

Return and answer to the rule to show cause was filed on June 10, 1957, and on June 11 the District Court heard argument. The court ruled that there was no material fact in issue on the record as it stood. On June 18, 1957, the District Court issued its order denying the petition for habeas corpus but granting declaratory relief and issuing an injunction against petitioners from delivering respondent to the custody of the Japanese Government. A notice of appeal was filed on June 18, 1957, and the record was docketed in the Court of Appeals on the same day.

REASONS FOR GRANTING THE WRIT

I

Respondent is now within the sovereign nation of Japan, awaiting trial by a Japanese court for an offense against Japanese law committed in Japanese territory. The Executive has agreed that, under international law and by international arrangement, Japan may proceed to trial and has duly waived any primary right to exercise jurisdiction over respondent which the United States may have. Nonetheless, the United States is restrained by judicial order from allowing Japan to take respondent into custody. That restraint inevitably interferes directly with Japan's exercise of its territorial and sovereign jurisdiction to which we have formally acceded and postpones the date of trial. Further delay will seriously aggravate an already unfortunate strain on United States-Japanese relations, as well as have an impact on our relations with other nations which have comparable arrangements with this country for the trial of American servicemen stationed in their territories.

An affidavit of the Secretary of State was submitted to the District Court indicating the urgency with which the Executive Branch has regarded the matter. The Secretary there stated that the decision not to exercise United States jurisdiction over Girard had been approved by him and by the Secretary of Defense:

* * * * *

> In addition we concluded that any prolongation of the dispute over this jurisdictional issue

might well have serious consequences upon United States relations not only with Japan, but also with many other nations.

4. Because of the imperative public importance of this matter, this joint conclusion of the Secretary of State and the Secretary of Defense was discussed with and approved by the President. It was then communicated to the Government of Japan. * * *

* * * * *

7. * * * It is a matter of importance to this country that any period of restraint prior to final decision be extremely short. Every hour in which that issue is left open on this basis prolongs a source of international friction and may have adverse effect upon our relations with Japan and other countries.

8. Because of the wide publicity that this proceeding has received, public opinion in Japan has been aroused. Any inability on the part of the United States officials concerned to honor this Government's commitment to permit Girard to be tried in the Japanese courts—particularly any such inability by reason of a temporary injunction or stay order pending final determination—will in my judgment give rise to serious difficulties in our relations with the Government and people of Japan and may involve risk of injury to United States personnel located in Japan.

A statement of the Secretary of Defense is set forth in Appendix C, *infra*. It indicates the great difficulties faced by that Department as a result of the decision below and the urgent need for an authoritative ruling.

The Government submits that all these circumstances demonstrate the imperative public importance of the case and warrant the deviation from normal appellate processes involved in granting certiorari prior to judgment in the Court of Appeals, so that the matter may be authoritatively determined, so far as the United States courts are concerned, before this Court recesses for the summer. Otherwise, the overwhelming likelihood is that the United States will be unable to fulfill its commitment to Japan for several trying months, even though the Japanese Government is very desirous of holding respondent's trial without delay and expects him to be turned over promptly. This is a case, therefore, which fulfills the specific requirement of Rule 20 that certiorari to a Court of Appeals before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

We firmly believe (as we show in Point II, *infra*) that, despite the District Court's ruling, respondent's case is totally without merit and that the Court can so decide promptly. The Government is prepared to file, within the next few days, a brief on the merits, if that is deemed desirable; it may be assumed that respondent's brief may be quickly prepared from his briefs in the District Court. If oral argument is believed necessary, the Government is ready to present it at the earliest date, convenient to the Court, and we have no doubt that respondent's counsel are equally ready and able to do so.

II

The position of the United States on the issues in the case is simple; it rests on the international aspects which the District Court has totally ignored. Under international law, Japan is sovereign within its own country. In the absence of express or implied agreement to the contrary, United States officials within Japan would be obliged by Japanese and international law to make respondent available to the Japanese authorities for trial there. Thus, if the international arrangements between the United States and Japan are invalid, respondent is plainly subject to the exclusive jurisdiction of Japan and has no claim whatever in American courts. And if, as we assert, the Security Treaty and implementing arrangements are valid, they indisputably authorize the United States to waive whatever jurisdiction it may have, including its so-called "primary" jurisdiction. This has been done in a decision approved by the highest executive officers of the Government. Such a waiver—or decision not to exercise jurisdiction—is not a justiciable issue to be decided by a court but a discretionary matter for the Executive Branch.[1]

[1] In view of the disposition of the case by the District Court, there is no need to consider the question of whether habeas corpus is available. Under 28 U. S. C. 2241, writs of habeas corpus may be granted by district courts only "within their respective jurisdictions". In *Ahrens* v. *Clark*, 335 U. S. 188, the Court found that this limitation referred to the territorial jurisdiction of each court, and held that the District Court for the District of Columbia did not have jurisdiction to issue a writ with respect to prisoners on Ellis Island, New York.

A. JAPAN HAS EXCLUSIVE JURISTICTION WITHIN ITS TERRITORY EXCEPT TO THE EXTENT THAT IT OTHERWISE AGREES

Under international law each country is sovereign within its own territory.

> The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. * * * All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. * * * [*The Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 136.]

Respondent is and at all times since the alleged offense has been within the territory of Japan. Except to the extent that Japan has consented otherwise, it has the exclusive right to define criminal offenses, to

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Subsequent decisions of this Court have left open the question of whether a different result would be reached where United States citizens were being held in custody by United States officials overseas, outside of the jurisdiction of any district court.

Even if this were still deemed a habeas corpus proceeding, the Court need not reach the question of whether the District Court for the District of Columbia has jurisdiction to grant a writ of habeas corpus for a person who at all relevant times has been in Japan. The merits are clear and the Government has agreed to treat the petition for a writ of habeas corpus as a request for equitable or declaratory relief. If the merits are clear, it is permissible to pass over a jurisdictional problem of greater difficulty where the resolution of that issue would not change the result. See *Brooks* v. *Dewar*, 313 U. S. 354, 359–360; *Johnson* v. *Eisentrager*, 339 U. S. 763, 790–791; *Secretary of Agriculture* v. *Central Roig Ref. Co.*, 338 U. S. 604, 619–620.

conduct trials, and to impose punishment for the commission of offenses on its own soil.[2]

American citizens entering Japan are thus subject to its criminal jurisdiction unless immunity is impliedly or expressly granted. In *The Schooner Exchange, supra,* a French military vessel entered a United States port without any express arrangement as to jurisdiction. The Court found that under the customs and conditions then prevailing there was implied consent that the vessel would be immune from jurisdiction. But the Court, through Chief Justice Marshall, went on to state:

> Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. [7 Cranch at 146]

See also *United States* v. *Flores,* 289 U. S. 137; *Wildenhus' Case,* 120 U. S. 1.

There is no question of an implied immunity from Japanese jurisdiction for the respondent. The terms and conditions under which American forces remain in Japan have not been left to implication. Under international law there is no requirement that a nation in allowing foreign troops to enter must grant them immunity from local criminal prosecution,[3] and

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[2] The Japanese Peace Treaty explicitly recognizes full Japanese sovereignty "over Japan and its territorial waters" (Appendix A, *infra,* p. 5a).

[3] See Schwartz, *International Law and the NATO Status of Forces Agreement,* 53 Col. L. Rev. 1091, 1106–1107:

> Accordingly, under *The Schooner Exchange,* the receiving state may demand any conditions it wishes before it

the arrangements governing jurisdiction over American troops in Japan have been carefully worked out by treaty and implementing agreements. These give the United States certain rights to exercise jurisdiction within Japan. The basic premise, however, is that in the absence of these agreements petitioner has no implied or other exemption from Japanese criminal jurisdiction. If the treaty or agreements were non-existent or were deemed invalid, there would be no question but that the Japanese authorities could properly take respondent into custody and try him for the offense under Japanese law with which he has.

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will permit friendly troops upon its soil. If these conditions are not satisfactory to the sending state it need not send the troops at all. This is a function of bargain and negotiation. To say that there is a rule of international law that friendly foreign nations have exclusive jurisdiction over their own forces does no more than to state what the situation might be in the event that the receiving state gave unqualified assent to their admission. Such a rule, if it exists at all, can play no part in determining the status of those forces where an agreement has been reached on that question.

See also Hyde, *International Law* (1945), Vol. II, p. 826, pointing out the importance of the point that a state, if it so desired, and sufficiently made known its intent, might withhold consent to any immunity and thereby retain exclusive jurisdiction.

None of the opinions in *Reid* v. *Covert*, No. 701, Oct. Term, 1955, and *Kinsella* v. *Krueger*, No. 713, Oct. Term, 1955, decided June 10, 1957, casts the slightest doubt on the plenary authority of the territorial sovereign over offenses committed on its soil. On the contrary, Mr. Justice Black's opinion expressly recognizes this plenary authority, apart from treaties and international agreements (slip op., pp. 13-14, fn. 29). The opinions of Mr. Justice Frankfurter and Mr. Justice Harlan also recognize, explicitly and implicitly, the dominant jurisdiction of the territorial sovereign.

been charged. And the courts of the United States would plainly have no authority to intervene. *Hirota* v. *MacArthur*, 338 U. S. 197.

To appreciate the error of the District Court's treating the matter as one of domestic law one need only recognize that the jurisdiction of a United States court over a killing within the United States would be exclusive unless covered by treaty, and could not be defeated by the terms of the Japanese constitution or statutes.

B. INTERNATIONAL ARRANGEMENTS GIVE THE UNITED STATES THE RIGHT TO EXERCISE CRIMINAL JURISDICTION WITHIN JAPAN IN CERTAIN CASES BUT IN NO CASE IS THE JURISDICTION MANDATORY AND UNITED STATES JURISDICTION MAY ALWAYS BE WAIVED

Three basic documents govern the terms under which the United States was allowed to deploy troops within Japan and to exercise criminal jurisdiction over them. These are (1) the Security Treaty, (2) the Administrative Agreement under Article III of the Security Treaty, and (3) the Protocol to Amend Article XVII of the Administrative Agreement. Under these agreements, Japan and the United States have concurrent jurisdiction to try members of the United States forces for offenses which constitute an offense both under Japanese law and under the Uniform Code of Military Justice. Where the offense is one "arising out of any act or omission done in the performance of official duty", the United States is given the "primary" right to exercise jurisdiction. In the case of offenses not arising out of an act done

in the performance of official duty, Japan retains the "primary" right to exercise jurisdiction. But if the state having the primary right "decides not to exercise jurisdiction" the other state may do so—that is, it may conduct a trial and, if the defendant is found to have committed the alleged offense, may impose punishment.

1. The Security Treaty

The Security Treaty with Japan (T. I. A. S. 2491) was signed and ratified concurrently with the Treaty of Peace with Japan (T. I. A. S. 2490). Under Article I, Japan granted to the United States and the United States accepted the right to dispose armed forces in and about Japan. Article III provided:

> The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments.

The Security Treaty thus provides the basic framework but none of the substantive terms relating to the exercise of criminal jurisdiction.

2. The Administrative Agreement

The Security Treaty was signed on September 8, 1951. Before it was ratified, an Administrative Agreement under Article III of the Treaty was signed on behalf of the United States on February 28, 1952. The signing was specifically authorized by the President (see Hearings on H. J. Res. 309, House Committee on Foreign Affairs, 84th Cong., 2d Sess.,

pt. 2, at p. 559). The Administrative Agreement was submitted to the Congress, and its text was before the Senate when that body gave its advice and consent to the Security Treaty. (The full texts of both the Security Treaty and the Administrative Agreement were inserted in the Congressional Record on March 17 and March 20, 1952; see 98 Cong. Rec. 2376, 2555). A reservation to the Security Treaty was proposed on the floor of the Senate which would have prevented the Administrative Agreement from being put into effect without Senate consent to ratification. This proposed reservation was voted down, and the Security Treaty was approved. 98 Cong. Rec. 2596.[4]

Substantively, two provisions of the Administrative Agreement bear on this case. Under Article XVII the United States committed itself to conclude with Japan an agreement on criminal jurisdiction similar to the corresponding provisions of the NATO Status of Forces treaty when that treaty came into effect. Under Article XXVI of the Administrative Agreement, there was established a Joint Committee as the means for consultation on all matters requiring mutual consultation regarding the implementation of the Agreement. That Article also provides that if the Joint Committee is unable to resolve any matter it shall refer it to the respective governments for further consideration through appropriate channels.

[4] See Hearing before a Subcommittee of the Committee on Armed Services, U. S. Senate, 85th Cong., 1st Sess. (William S. Girard case), June 5, 1957, at pp. 7–8; cf. Hearings before the Committee on Foreign Relations, U. S. Senate, 83d Cong., 1st Sess., Status of Forces of the North Atlantic Treaty, pp. 5, 78; Supplemental Hearings, p. 64.

3. Protocol

Following the coming into effect of the NATO Status of Forces treaty, the United States concluded with Japan, at its request and in compliance with the obligation of the United States under the Administrative Agreement, a Protocol to Amend Article XVII of the Administrative Agreement. This Protocol provides the substantive agreement under which the United States is now allowed to exercise criminal jurisdiction over certain offenses in Japan. This agreement is that in regard to criminal jurisdiction over American military personnel in Japan (1) United States military authorities shall have *exclusive* jurisdiction over offenses which are punishable by American but not by Japanese law; (2) Japanese authorities shall have *exclusive* jurisdiction over offenses punishable by Japanese but not by American law; (3) where "the right to exercise jurisdiction is concurrent" American military authorities shall have *primary* jurisdiction in relation to offenses against the property or the security of the United States, the property or the person of other members of the American armed forces, and offenses "arising out of any act or omission done in the performance of official duty"; the Japanese authorities shall have *primary* jurisdiction over all other offenses. The Protocol further provides in Paragraph 3 (c) that

> If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic con-

> sideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

It was under this provision of Paragraph 3 (c)—which explicitly provides that "primary" jurisdiction may be waived—that the United States determined to waive any right to exercise its jurisdiction, and to concede to Japan's request that that state exercise its own jurisdiction. This determination was confirmed by the Secretaries of State and Defense and by the President. See the Statement, *supra*, pp. 6–7 and pp. 9–10.

C. THE EXECUTIVE DETERMINATION TO WAIVE UNITED STATES JURISDICTION IS NOT JUDICIALLY REVIEWABLE

Under the international arrangements with Japan, the right to exercise primary jurisdiction in particular cases is a right of the United States, not of the individual soldier. The decision whether or not to exercise that right is one for the United States to make in its discretion and in the light of the best interests of the country as viewed by the Government; the arrangements certainly do not confer upon each accused an option to be tried by court-martial or local court as he might choose. Moreover, the established doctrine is that the exercise of executive discretion in this political field is not subject to any review by the courts.

1. The decision as to whether paragraph 3 (c) of the Protocol, *supra*, is to be invoked, and primary jurisdiction waived, is obviously one for the Execu-

tive in its conduct of foreign affairs. The problems of foreign relations provide both the context of, and the touchstone for, the exercise or nonexercise of these waiver provisions. It necessarily follows that a decision to waive is plainly not a matter for judicial review. The courts have, since the earliest days of the Republic, recognized the conduct of foreign relations as falling within the exclusive power of the political branches of the Government, particularly the Executive. *Foster* v. *Neilson*, 2 Pet. 253; *Williams* v. *Suffolk Insurance Co.*, 13 Pet. 415; *The Chinese Exclusion Case*, 130 U. S. 581; *Jones* v. *United States*, 137 U. S. 202; *Terlinden* v. *Ames*, 184 U. S. 270; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304. See also *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111:

> * * * the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

It would be difficult to find a case in which this admonition were more applicable. Untold and unmeasurable damage to the foreign relations of the United States will inevitably result if its hands are to be tied by the type of judicial intervention which this respondent seeks. This Court, it is submitted, should reject that responsibility.

2. Respondent has argued—and the District Court has held—that the United States cannot waive jurisdiction in a case where the international arrangement provides for primary jurisdiction in the American military courts. The holding below is that a waiver under such circumstances would be a waiver of the constitutional rights of the individual (App. B, *infra*, p. 50a). But, as shown *supra*, under international law the foreign sovereign has complete and absolute jurisdiction in its own territory, absent a treaty or other agreement, and an American has no constitutional rights against exercise by Japan of its undoubted territorial jurisdiction. Whatever rights the *United States* may have, it obtains them by the international arrangements; those rights are national, not personal. The matter is exclusively one between the two nations. Even the stronger right of diplomatic immunity has always been held to be waivable by the Government, without regard to the wishes of the individual concerned. See, *e. g.*, Article 22 of the Agreement relating to the status of the North Atlantic Treaty Organization, T. I. A. S. 2992; and Section 20 of Article V to the convention between

the United Nations and the United States (Feb. 1946).[5]

Moreover, respondent can hardly be permitted to rely on those provisions of the arrangement which confer primary jurisdiction upon the United States in certain specified instances, while he denies other portions which provide for a waiver of rights by the Government. If the agreement is valid, then the United States may validly waive under paragraph 3 (c); if the United States cannot waive under paragraph 3 (c) because it is invalid, then the entire arrangement is inoperative and respondent would be relegated to his status under international law, which would mean that he would be subject to exclusive Japanese jurisdiction. To hold that the United States must exercise jurisdiction in all those instances in which it possesses primary jurisdiction would be to nullify the waiver provisions of paragraph 3 (c), for they apply only in those cases where a state *does* have primary jurisdiction. It is under this para-

[5] As for the rule that diplomatic immunity is the privilege of the sovereign, see *Davis* v. *Packard*, 7 Pet. 276, 284; *Börs* v. *Preston*, 111 U. S. 252, 256; *Ex parte Gruber*, 269 U. S. 302; *Arcaya* v. *Paez*, 145 F. Supp. 464 (S. D. N. Y.); *United States* v. *Coplon*, 88 F. Supp. 915, 921 (S. D. N. Y.), reversed on other grounds as to a co-defendant, 185 F. 2d 629 (C. A. 2).

Even the immunity of a soldier within the United States from state prosecution is a matter to be asserted not by the individual but by the military authorities, who may waive the immunity without regard to the desires of the defendant. *Harris* v. *Hunter*, 170 F. 2d 552 (C. A. 10); *Kennedy* v. *Sanford*, 166 F. 2d 568 (C. A. 5), certiorari denied, 333 U. S. 864; *Scott* v. *State*, 247 Ala. 62, 22 So. 2d 529; *Application of Baer*, 41 N. Y. S. 2d 413; *Ex parte William Sumner*, 143 Tex. Cr. 238, 158 S. W. 2d 310; *Ex parte Koester*, 206 Pac. 116.

graph that the Japanese authorities have waived their primary jurisdiction in 97% of the cases in which Japan has had such primary jurisdiction. If the paragraph is invalid or inoperative, no such reciprocity could continue.

Nevertheless, in a ruling which in effect excises paragraph 3 (c) from the international agreement, the District Court has held that where the United States has primary jurisdiction it cannot waive. Applying the wholly inapposite analogy of remission of a federal officer for state trial (*e. g., In re Neagle*, 135 U. S. 1 (see App. B, *infra*, pp. 48a–49a),[4] the District Court totally disregards (a) the international character of the present case, and (b) the existence and explicit terms of paragraph 3 (c). Instead, the court purports to give "the same constitutional protection" to the respondent "against his delivery to a foreign State that would be applied to his delivery for prosecution in a state court * * *" (App. B, *infra*, p. 49a). But the cardinal fact is, of course, that Japan is not like a state of the American union, subordinate to the Federal Government and its courts. Japan is an independent sovereign power with full jurisdiction under international law to try all offenses against its laws committed on its territory. And individual

[4] The *Neagle* rule, on which the District Court relies, does not seem to apply to remission of servicemen to state courts for state trial in lieu of court-martial trial. See fn. 5, *supra*. Moreover, the *Neagle* rule is not a constitutional principle, but rests merely on the federal legislation providing for federal trial of federal officials who commit injuries in the course of their federal service; the rule is solely statutory.

Americans in Japan have, as we have pointed out, no constitutional or treaty rights as against a trial there by Japan for an offense against Japanese law.

3. There is also no substance whatever to the related claim that it would be contrary to Congressional legislation to remit respondent to the Japanese authorities. Congress has specifically authorized the trial of military personnel by local civil authorities. Article 74 of the old Articles of War made it mandatory on Army commanding officers to turn soldiers over to local civil authorities within the United States (41 Stat. 803):

> ART. 74. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense *committed within the geographical limits of the States of the Union and the District of Columbia*, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. * * * [Emphasis added.]

In adopting the Uniform Code of Military Justice, the geographical limitation was eliminated, and it was made discretionary rather than mandatory to turn a soldier over to local civil authorities:

ART. 14. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES

(a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

* * * * *

[10 U. S. C. (Supp. IV) 814, 70A Stat. 41]

Reading Article 14 in conjunction with Article 5, which provides, "This chapter applies in all places", there can be no doubt that Congress, by legislation, has granted adequate authority to deliver soldiers for trial by civil authority at home or abroad.

4. Respondent is likewise wholly mistaken in relying upon extradition treaties as support for his position that he can contest the executive decision. In the first place, a person being extradited is within the United States, where the United States has exclusive jurisdiction, except that given up by agreement, rather than in Japan where Japan has exclusive jurisdiction except that which the United States has acquired by agreement. Persons in the United States who are sought to be extradited do have certain rights under American law. Individuals in Japan whom the Japanese seek to try for a local offense have no such rights under *American law*, as against the Japanese authorities.

Secondly, respondent is mistaken in arguing that a treaty cannot confer discretionary authority on the executive to extradite. The very case relied on by

respondent, *Valentine* v. *U. S. ex rel. Neidecker*, 29 U. S. 5, 12–13, quotes with approval extradition treaties giving the Executive discretionary power to surrender citizens to foreign countries. The Court relied on the presence of that clause in other treaties to find that it should not be implied in the French treaty there in question:

> Of far greater significance is the fact that a familiar clause—found in several of our treaties—which qualifies the exception of citizens by expressly conferring discretionary power to surrender them was omitted in the treaty with France.

For seventy years, the United States has had in effect with Japan an extradition treaty under which the turning over of citizens was discretionary on each side.[7]

D. THERE HAS BEEN NO ABUSE OF DISCRETION

Assuming that the executive decision not to exercise primary jurisdiction over respondent—to "waive" jurisdiction—is subject to any judicial review on the merits, it is clear that there was no abuse of discretion. There was a prolonged dispute between Japan and the United States as to which had primary jurisdiction. Japan's contention that the killing did not

[7] Article VII, Treaty of April 29, 1886, TS 191, 24 Stat. 1015. Similar clauses appear in the treaty with Argentina of September 26, 1896, TS 6, 31 Stat. 1883, the treaty with Uruguay of March 11, 1905, TS 501, 35 Stat. 2028 and the former treaty with the Orange Free State of October 28, 1896, TS 266, 31 Stat. 1813. The following treaties specifically confer discretion upon the executive authority: treaty with Guate-

arise from an act done in the performance of official duty was reasonable. Its position was apparently supported by the United States Army Circular (Appendix A, *infra*, p. 37a) which provided that, for the purposes of the agreements with Japan "official duty"—

> * * * is meant to apply only to acts which are required to be done as a function of those duties which the individuals are performing.

There was the further question of whether a Japanese court did not have the right to make a judicial determination of the question of whether the act done was in the performance of official duty. The Agreed Official Minutes to the Protocol (Appendix A, *infra*, p. 29a) provided that the certificate of a commanding officer—

> * * * shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

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mala of February 27, 1903, TS 425, 33 Stat. 2147; treaty with Mexico of February 22, 1899, TS 242, 31 Stat. 1818; treaty with Nicaragua of March 1, 1905, TS 462, 35 Stat. 1869, in an article reading:

> Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so.

For the background of the Mexican treaty and an account of President McKinley's exercise of his discretion, in the case of Mattie Rich, see Rafuse, *The Extradition of Nationals* (1939), University of Illinois, pp. 44–46.

This language may be said to refer to a Japanese judicial proceeding.[8] This has never yet been done, and there would appear to be advantages to the United States in not establishing such a precedent.

Further, Japan has waived its primary jurisdiction in over 97 percent of the cases involving members of the United States military forces where primary jurisdiction was in Japan. This is the first case in which the United States has made a decision not to exercise primary jurisdiction where, by hypothesis, it had it. It may well be that the United States concluded that to waive jurisdiction in this case was essential if the United States was to continue to ask and receive waivers in the vast number of cases where Japan had primary jurisdiction.

The very recitation of these considerations, together with the sharply disputed facts as to the circumstances of the killing (see the Statement, *supra,* and App. B, *infra,* pp. 39a–40a, 42a–43a), demonstrate not only that the decision of the Executive was reasonable but that the decision itself is one for the Executive to make rather than a court.

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[8] The language is derived from the British Visiting Forces Act of 1952, which was amended in passage so that the certificate of a visiting commanding officer that an offense arose from an act done in the performance of official duty would not be conclusive on the British courts. See, *e. g.* 178 Parliamentary Debates (Hansard) (Lords), 5th Series, page 1076:

> Now, the man is brought before a court in the United Kingdom and that court can say "No, it is not conclusive: we will show that the certificate is wrong." That is the only result of the Amendment.

CONCLUSION

It is respectfully submitted that the decision of the District Court is so clearly wrong, and the public interest in an early disposition of this case so great that the Court should:

1. order respondent to file a response to this petition within two days,
2. grant the writ of certiorari,
3. set the case down for further briefing and oral argument, if deemed necessary, at an early date convenient to the Court, and
4. reverse the decision of the District Court on the merits.

Respectfully submitted.

HERBERT BROWNELL, JR.,
Attorney General.

J. LEE RANKIN,
Solicitor General.

JUNE 1957.

APPENDIX A

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[Matter which might be considered particularly relevant has been printed in bold face type]

Treaties and Other International Acts Series 2490

TREATY OF PEACE WITH JAPAN

- Signed at San Francisco September 8, 1951
- Ratification advised by the Senate of the United States of America March 20, 1952, with a declaration
- Ratified by the President of the United States of America April 15, 1952, subject to declaration
- Ratification of the United States of America deposited at Washington April 28, 1952
- Proclaimed by the President of the United States of America April 28, 1952
- Entered into force April 28, 1952

TREATY OF PEACE WITH JAPAN

Whereas the Allied Powers and Japan are resolved that henceforth their relations shall be those of nations which, as sovereign equals, cooperate in friendly association to promote their common welfare and to maintain international peace and security, and are therefore desirous of concluding a Treaty of Peace which will settle questions still outstanding as a result of the existence of a state of war between them;

* * * * *

CHAPTER I

PEACE

ARTICLE 1

(a) The state of war between Japan and each of the Allied Powers is terminated as from the date on which the present Treaty comes into force between Japan and the Allied Power concerned as provided for in Article 23.

(b) The Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters.

CHAPTER II

TERRITORY

ARTICLE 2

(a) Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, includ-

ing the islands of Quelpart, Port Hamilton and Dagelet.

(b) Japan renounces all right, title and claim to Formosa and the Pescadores.

(c) Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.

(d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan.

(e) Japan renounces all claim to any right or title to or interest in connection with any of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise.

(f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.

ARTICLE 3

* * * * *

Treaties and Other International Acts Series 2491

SECURITY TREATY

Between the
UNITED STATES OF AMERICA
and JAPAN

- Signed at San Francisco September 8, 1951
- Ratification advised by the Senate of the United States of America March 20, 1952
- Ratified by the President of the United States of America April 15, 1952
- Ratified by Japan November 19, 1951
- Ratifications exchanged at Washington April 28, 1952
- Proclaimed by the President of the United States of America April 28, 1952
- Entered into force April 28, 1952

SECURITY TREATY

BETWEEN

THE UNITED STATES OF AMERICA AND JAPAN

Japan has this day signed a Treaty of Peace with the Allied Powers.[1] On the coming into force of that Treaty, Japan will not have the effective means to exercise its inherent right of self-defense because it has been disarmed.

There is danger to Japan in this situation because irresponsible militarism has not yet been driven from the world. Therefore Japan desires a Security Treaty with the United States of America to come into force simultaneously with the Treaty of Peace between the United States of America and Japan.

The Treaty of Peace recognizes that Japan as a sovereign nation has the right to enter into collective security arrangements, and further, the Charter of the United Nations recognizes that all nations possess an inherent right of individual and collective self-defense.

In exercise of these rights, Japan desires, as a provisional arrangement for its defense, that the United States of America should maintain armed forces of its own in and about Japan so as to deter armed attack upon Japan.

The United States of America, in the interest of peace and security, is presently willing to maintain

[1] Treaties and Other International Acts Series 2490.

certain of its armed forces in and about Japan, in the expectation, however, that Japan will itself increasingly assume responsibility for its own defense against direct and indirect aggression, always avoiding any armament which could be an offensive threat or serve other than to promote peace and security in accordance with the purposes and principles of the United Nations Charter.

Accordingly, the two countries have agreed as follows:

ARTICLE I

Japan grants, and the United States of America accepts, the right, upon the coming into force of the Treaty of Peace and of this Treaty, to dispose United States land, air and sea forces in and about Japan. Such forces may be utilized to contribute to the maintenance of international peace and security in the Far East and to the security of Japan against armed attack from without, including assistance given at the express request of the Japanese Government to put down large-scale internal riots and disturbances in Japan, caused through instigation or intervention by an outside power or powers.

ARTICLE II

During the exercise of the right referred to in Article I, Japan will not grant, without the prior consent of the United States of America, any bases or any rights, powers or authority whatsoever, in or relating to bases or the right of garrison or of maneuver, or transit of ground, air or naval forces to any third power.

ARTICLE III

The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments.

ARTICLE IV

This Treaty shall expire whenever in the opinion of the Governments of the United States of America and Japan there shall have come into force such United Nations arrangements or such alternative individual or collective security dispositions as will satisfactorily provide for the maintenance by the United Nations or otherwise of international peace and security in the Japan Area.

ARTICLE V

This Treaty shall be ratified by the United States of America and Japan and will come into force when instruments of ratification thereof have been exchanged by them at Washington.

IN WITNESS WHEREOF the undersigned Plenipotentiaries have signed this Treaty.

DONE in duplicate at the city of San Francisco, in the English and Japanese languages, this eighth day of September, 1951.

For the United States of America:

DEAN ACHESON
JOHN FOSTER DULLES
ALEXANDER WILEY
STYLES BRIDGES

For Japan:

Treaties and Other International Acts Series 2492

ADMINISTRATIVE AGREEMENT

Between the
UNITED STATES OF AMERICA
and JAPAN

- Signed at Tokio February 28, 1952
- Entered into force April 28, 1952

ADMINISTRATIVE AGREEMENT

UNDER ARTICLE III OF THE SECURITY TREATY BETWEEN THE UNITED STATES OF AMERICA AND JAPAN

PREAMBLE

Whereas the United States of American and Japan on September 8, 1951, signed a Security Treaty which contains provisions for the disposition of United States land, air and sea forces in and about Japan;

And whereas Article III of that Treaty states that the conditions which shall govern the disposition of the armed forces of the United States in and about Japan shall be determined by administrative agreements between the two Governments;

And whereas the United States of America and Japan are desirous of concluding practical administrative arrangements which will give effect to their respective obligations under the Security Treaty and will strengthen the close bonds of mutual interest and regard between their two peoples;

Therefore, the Governments of the United States of America and of Japan have entered into this Agreement in terms as set forth below:

* * * * *

ARTICLE II

1. Japan agrees to grant to the United States the use of the facilities and areas necessary to carry out the purposes stated in Article I of the Security Treaty. Agreements as to specific facilities and areas,

not already reached by the two Governments by the effective date of this Agreement, shall be concluded by the two Governments through the Joint Committee provided for in Article XXVI of this Agreement. "Facilities and areas" include existing furnishings, equipment and fixtures necessary to the operation of such facilities and areas.

* * * * *

4. (a) When facilities and areas such as target ranges and maneuver grounds are temporarily not being used by the United States armed forces, interim use may be made by Japanese authorities and nationals provided that it is agreed that such use would not be harmful to the purposes for which the facilities and areas are normally used by the United States armed forces.

(b) With respect to such facilities and areas as target ranges and maneuver grounds which are to be used by United States armed forces for limited periods of time, the Joint Committee shall specify in the agreements concerning such facilities and areas the extent to which the provisions of this Agreement shall apply.

ARTICLE III

1. The United States shall have the rights, power and authority within the facilities and areas which are necessary or appropriate for their establishment, use, operation, defense or control. . . .

* * * * *

ARTICLE XIV

1. Persons, including corporations organized under the laws of the United States, and their employees who are ordinarily resident in the United States and whose presence in Japan is solely for the purpose of

executing contracts with the United States for the benefit of the United States armed forces shall, except as provided in this Article, be subject to the laws and regulations of Japan.

* * * * *

7. Japanese authorities shall have the primary right to exercise jurisdiction over the persons and their employees referred to in paragraph 1 of this Article in relation to offenses committed in Japan and punishable by the law of Japan. In those cases in which the Japanese authorities decide not to exercise such jurisdiction they shall notify the military authorities of the United States as soon as possible. Upon such notification the military authorities of the United States shall have the right to exercise such jurisdiction over the persons referred to as is conferred on them by the law of the United States.

* * * * *

ARTICLE XVI

It is the duty of members of the United States armed forces, the civilian component, and their dependents to respect the law of Japan and to abstain from any activity inconsistent with the spirit of this Agreement, and, in particular, from any political activity in Japan.

ARTICLE XVII

1. Upon the coming into force with respect to the United States of the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces," signed at London on June 19, 1951, the United States will immediately conclude with Japan, at the option of Japan, an agreement on criminal

jurisdiction similar to the corresponding provisions of that Agreement.

2. Pending the coming into force with respect to the United States of the North Atlantic Treaty Agreement referred to in paragraph 1, the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality. **Such jurisdiction may in any case be waived by the United States.**

3. While the jurisdiction provided in paragraph 2 is effective, the following provisions shall apply:

* * * * *

ARTICLE XXVI

1. A Joint Committee shall be established as the means for consultation between the United States and Japan on all matters requiring mutual consultation regarding the implementation of this Agreement. In particular, the Joint Committee shall serve as the means for consultation in determining the facilities and areas in Japan which are required for the use of the United States in carrying out the purposes stated in Article I of the Security Treaty.

2. The Joint Committee shall be composed of a representative of the United States and of Japan, each of whom shall have one or more deputies and a staff. The Joint Committee shall determine its own procedures, and arrange for such auxiliary organs and administrative services as may be required. The Joint Committee shall be so organized that it may meet immediately at any time at the request of the representative of either the United States or Japan.

3. If the Joint Committee is unable to resolve any matter, it shall refer that matter to the respective governments for further consideration through appropriate channels.

ARTICLE XXVII

1. This Agreement shall come into force on the date on which the Security Treaty between the United States and Japan enters into force.

* * * * *

IN WITNESS WHEREOF the representatives of the two Governments, duly authorized for the purpose, have signed this Agreement.

DONE at Tokyo, in duplicate, in the English and Japanese languages, both texts authentic, this twenty-eighth day of February, 1952.

For the Government of the United States of America:

[SEAL] DEAN RUSK
EARL D. JOHNSON

For the Government of Japan:

[SEAL] K. OKAZAKI

EXCHANGE OF NOTES

United States Note to Japan.

TOKYO, *February 28, 1952*

EXCELLENCY:

I have the honor to refer to our discussion on the terms of the Administrative Agreement signed today, in which Your Excellency stated as the opinion of the

Japanese Government that, as the occupation of Japan by the Allied Powers comes to an end on the coming into force of the Treaty of Peace with Japan, the use of facilities and areas by United States forces on the basis of occupation requisition also comes to an end on the same date; thereafter, the use of facilities and areas by United States forces must be based upon agreement between the two Governments, subject to the rights which each might have under the Treaty of Peace with Japan, the Security Treaty, and the Administrative Agreement. I hereby confirm that such is also the opinion of the United States Government.

* * * * *

Accept, Excellency, the assurances of my highest consideration.

DEAN RUSK
Special Representative of the President
of the United States of America

Treaties and Other International Acts Series 2848

AMENDMENT OF ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT UNDER ARTICLE III OF THE SECURITY TREATY

Protocol, and Official Minutes,
between the UNITED STATES OF AMERICA
and JAPAN

Signed at Tokyo September 29, 1953

Entered into force October 29, 1953

PROTOCOL TO AMEND ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT UNDER ARTICLE III OF THE SECURITY TREATY BETWEEN THE UNITED STATES OF AMERICA AND JAPAN

Whereas the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces", signed at London on June 19, 1951, [1] came into force on August 23, 1953 with respect to the United States of America; and

Whereas Japan desires to conclude with the United States of America an agreement on criminal jurisdiction similar to the corresponding provisions of the said Agreement in accordance with the provisions of paragraph 1 of Article XVII of the Administrative Agreement, signed at Tokyo on February 28, 1952, [2] under Article III of the Security Treaty [3] between the United States of America and Japan;

Now the Governments of the United States of America and Japan have agreed that the existing provisions of Article XVII of the said Administrative Agreement shall be abrogated and the following provisions shall be substituted:

ARTICLE XVII

1. Subject to the provisions of this Article,

(a) the military authorities of the United States shall have the right to exercise within

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[1] Treaties and Other International Acts Series 2846.

[2] TIAS 2492.

[3] TIAS 2491.

Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States;

(b) the authorities of Japan shall have jurisdiction over the members of the United States armed forces, the civilian component, and their dependents with respect to offenses committed within the territory of Japan and punishable by the law of Japan.

2. (a) The military authorities of the United States shall have the right to exercise exclusive jurisdiction over persons subject to the military law of the United States with respect to offenses, including offenses relating to its security, punishable by the law of the United States, but not by the law of Japan.

(b) The authorities of Japan shall have the right to exercise exclusive jurisdiction over members of the United States armed forces, the civilian component, and their dependents with respect to offenses, including offenses relating to the security of Japan, punishable by its law but not by the law of the United States.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States

armed forces or the civilian component in relation to

(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent;

(ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the United States to exercise jurisdiction over persons who are nationals of or ordinarily resident in Japan, unless they are members of the United States armed forces.

5. (a) The military authorities of the United States and the authorities of Japan shall assist each other in the arrest of members of the United States armed forces; the civilian component, or their dependents in the territory of Japan and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

(b) The authorities of Japan shall notify promptly the military authorities of the United States of the arrest of any member of the United States armed forces, the civilian component, or a dependent.

(c) The custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged by Japan.

6. (a) The military authorities of the United States and the authorities of Japan shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

(b) The military authorities of the United States and the authorities of Japan shall notify each other of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.

7. (a) A death sentence shall not be carried out in Japan by the military authorities of the United States if the legislation of Japan does not provide for such punishment in a similar case.

(b) The authorities of Japan shall give sympathetic consideration to a request from the military authorities of the United States for assistance in carrying out a sentence of imprisonment pronounced by the military authorities of the United States under the provisions of this Article within the territory of Japan.

8. Where an accused has been tried in accordance with the provisions of this Article either by the military authorities of the United States or the authori-

ties of Japan and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the territory of Japan by the authorities of the other State. However, nothing in this paragraph shall prevent the military authorities of the United States from trying a member of its armed forces for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of Japan.

9. Whenever a member of the United States armed forces, the civilian component or a dependent is prosecuted under the jurisdiction of Japan, he shall be entitled:

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;

(d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of Japan;

(e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan;

(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the United States and to have such a representative present at his trial.

10. (a) Regularly constituted military units or formations of the United States armed forces shall have the right to police any facilities or areas which

they use under Article II of this Agreement. The military police of such forces may take all appropriate measures to ensure the maintenance of order and security within such facilities and areas.

(b) Outside these facilities and areas, such military police shall be employed only subject to arrangements with the authorities of Japan and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the United States armed forces.

11. In the event of hostilities to which the provisions of Article XXIV of this Agreement apply, either the United States or Japan shall have the right, by giving sixty days' notice to the other, to suspend the application of any of the provisions of this Article. If this right is exercised, the United States and Japan shall immediately consult with a view to agreeing on suitable provisions to replace the provisions suspended.

The present Protocol shall come into effect thirty day after the date of its signing.

IN WITNESS WHEREOF the representatives of the two Governments, duly authorized for the purpose, have signed the present Protocol.

DONE at Tokyo, in duplicate, in the English and Japanese languages, both texts being equally authentic, this twenty-ninth day of September, 1953.

For the Government of the United States of America:

[SEAL] JOHN M. ALLISON

For the Government of Japan:

[SEAL] KATSUO OKAZAKI
TAKESHI INUKAI

AGREED OFFICIAL MINUTES REGARDING PROTOCOL TO AMEND ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND JAPAN

Re paragraph 1 (a) and paragraph 2 (a):

The scope of persons subject to the military law of the United States shall be communicated, through the Joint Committee, to the Government of Japan by the Government of the United States.

Re paragraph 2 (c):

Both Governments shall inform each other of the details of all the security offenses mentioned in this subparagraph and the provisions governing such offenses in the existing laws of their respective countries.

Re paragraph 3 (a) (ii):

Where a member of the United States armed forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that the alleged offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

The above statement shall not be interpreted to prejudice in any way Article 318 of the Japanese Code of Criminal Procedure.

Re paragraph 3 (c):

1. Mutual procedures relating to waivers of the primary right to exercise jurisdiction shall be determined by the Joint Committee.

2. Trials of cases in which the Japanese authorities have waived the primary right to exercise jurisdiction, and trials of cases involving offenses described in paragraph 3 (a) (ii) committed against the State or nationals of Japan shall be held promptly in Japan within a reasonable distance from the places where the offenses are alleged to have taken place unless other arrangements are mutually agreed upon. Representatives of the Japanese authorities may be present at such trials.

Re paragraph 4:

Dual nationals, United States and Japanese, who are subject to the military law of the United States and are brought to Japan by the United States shall not be considered as nationals of Japan, but shall be considered as United States nationals for the purposes of this paragraph.

Re paragraph 5:

1. In case the Japanese authorities have arrested an offender who is a member of the United States armed forces, the civilian component, or a dependent subject to the military law of the United States with respect to a case over which Japan has the primary right to exercise jurisdiction, the Japanese authorities will, unless they deem that there is adequate cause and necessity to retain such offender, release him to the custody of the United States military authorities, provided that he shall, on request, be made available to the Japanese authorities, if such be the condition of his release. The United States authorities shall, on request, transfer his custody to the Japanese authorities at the time he is indicted by the latter.

2. The United States military authorities shall promptly notify the Japanese authorities of the arrest of any member of the United States armed forces, the civilian component or a dependent in any case in which Japan has the primary right to exercise jurisdiction.

Re paragraph 9:

1. The rights enumerated in items (a) through (e) of this paragraph are guaranteed to all persons on trial in Japanese courts by the provisions of the Japanese Constitution. In addition to these rights, a member of the United States armed forces, the civilian component or a dependent who is prosecuted under the jurisdiction of Japan shall have such other rights as are guaranteed under the laws of Japan to all persons on trial in Japanese courts. Such additional rights include the following which are guaranteed under the Japanese Constitution:

(a) He shall not be arrested or detained without being at once informed of the charge against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel;

(b) He shall enjoy the right to a public trial by an impartial tribunal;

(c) He shall not be compelled to testify against himself;

(d) He shall be permitted full opportunity to examine all witnesses;

(e) No cruel punishments shall be imposed upon him.

2. The United States authorities shall have the right upon request to have access at any time to members of the United States armed forces, the civilian component, or their dependents who are confined or detained under Japanese authority.

3. Nothing in the provisions of paragraph 9 (g) concerning the presence of a representative of the United States Government at the trial of a member of the United States armed forces, the civilian component or a dependent prosecuted under the jurisdiction of Japan, shall be so construed as to prejudice the provisions of the Japanese Constitution with respect to public trials.

Re paragraphs 10 (a) and 10 (b):

1. The United States military authorities will normally make all arrests within facilities and areas in use by and guarded under the authority of the United States armed forces. This shall not preclude the Japanese authorities from making arrests within facilities and areas in cases where the competent authorities of the United States armed forces have given consent, or in cases of pursuit of a flagrant offender who has committed a serious crime.

Where persons whose arrest is desired by the Japanese authorities and who are not subject to the jurisdiction of the United States armed forces are within facilities and areas in use by the United States armed forces, the United States military authorities will undertake, upon request, to arrest such persons. All persons arrested by the United States military authorities, who are not subject to the jurisdiction of the United States armed forces, shall immediately be turned over to the Japanese authorities.

The United States military authorities may, under due process of law, arrest in the vicinity of a facility or area any person in the commission or attempted commission of an offense against the security of that facility or area. Any such person not subject to the jurisdiction of the United States armed forces shall immediately be turned over to the Japanese authorities.

2. The Japanese authorities will normally not exercise the right of search, seizure, or inspection with respect to any persons or property within facilities and areas in use by and guarded under the authority of the United States armed forces or with respect to property of the United States armed forces wherever situated, except in cases where the competent authorities of the United States armed forces consent to such search, seizure, or inspection by the Japanese authorities of such persons or property.

Where search, seizure, or inspection with respect to persons or property within facilities and areas in use by the United States armed forces or with respect to property of the United States armed forces in Japan is desired by the Japanese authorities, the United States military authorities will undertake, upon request, to make such search, seizure, or inspection. In the event of a judgment concerning such property, except property owned or utilized by the United States Government or its instrumentalities, the United States will turn over such property to the Japanese authorities for disposition in accordance with the judgment.

Re application of the Protocol:

The provisions of the Protocol shall not apply to any offenses committed before the coming into

effect of the Protocol. Such cases shall be governed by the provisions of Article XVII of the Administrative Agreement as it existed prior to the coming into effect of the Protocol.

JOHN M. ALLISON
Ambassador Extraordinary and Plenipotentiary of the United States of America.

KATSUO OKAZAKI
Minister for Foreign Affairs of Japan.

TAKESHI INUKAI
Minister of Justice of Japan.

TOKYO, *September 29, 1953.*

AGREED VIEWS

SUB-COMMITTEE ON JURISDICTION

ADMINISTRATIVE AGREEMENT MATTERS

CRIMINAL PANEL

The matters of procedure, definition and interpretation set out below have been agreed to by the United States and Japanese members of the Criminal Panel, Jurisdiction Sub-committee, with respect to the Protocol and Official Minutes of 29 September 1953, amending Article XVII of the Administrative Agreement between the United States and Japan. These matters were approved by the Joint Committee under Article XXVI of the Administrative Agreement as follows:

* * * * *

Agreed Views No 37 through No 43 . . . Approved 29 October 1953, effective 28 October 1953

* * * * *

PART II

EXERCISE OF JURISDICTION

* * * * *

No 39: The term "official duty" as referred to in paragraph 3 (a) (ii) of the Protocol and Official Minutes relating thereto is understood to be any duty or service required or authorized to be done by stat-

ute, regulation, the order of a superior or military usage.

* * * * *

[Criminal Jurisdiction in Japan, Headquarters, Far East Command, APO 500, FEC Pamphlet No. 27–1, January 1956, pp. 7, 14]

UNITED STATES ARMY FORCES, FAR EAST
AND
EIGHTH UNITED STATES ARMY (REAR)
CIRCULAR 22-1

ADMINISTRATION OF MILITARY JUSTICE AND RELATED MATTERS

24 January 1956

* * * * *

23. ACTS OR OMISSIONS ARISING FROM OFFICIAL DUTY.—*a.* General.—The United States has the primary right to exercise jurisdiction over offenses arising from an act or omission of a member or civilian employee of the United States armed forces arising from the performance of official duty. (See para 3, Article XVII.). The term "official duty" as used in Article XVII, Official Minutes, and the Agreed Views is not meant to include all acts by members of the armed forces and civilian component during periods while they are on duty, but is meant to apply only to acts which are required to be done as a function of those duties which the individuals are performing. Thus, a substantial departure from the acts a person is required to perform in a particular duty usually will indicate an act outside of his "official duty." [page 21]

* * * * *

APPENDIX B

In the United States District Court for the District of Columbia

H. C. 47–57

WILLIAM S. GIRARD, UNITED STATES ARMY SPECIALIST 3/C, PETITIONER

vs.

CHARLES E. WILSON, SECRETARY OF DEFENSE; JOHN FOSTER DULLES, SECRETARY OF STATE; WILBUR M. BRUCKER, SECRETARY OF THE ARMY; GENERAL MAXWELL D. TAYLOR, HEAD JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE; MAJOR GENERAL W. H. MAGLIN, PROVOST MARSHAL GENERAL, UNITED STATES ARMY; GENERAL LYMAN LEMNITZER, COMMANDING GENERAL, FAR EAST COMMAND; RESPONDENTS

OPINION

This is a Petition for a Writ of Habeas Corpus and for other relief, filed by William S. Girard, United States Army Specialist Third Class, against the Secretary of Defense and others, in which he alleges that on or about January 30, 1957, he was arrested and thereafter held in confinement by the military authorities of the United States and is presently held in such confinement for the purpose of being delivered to the Government of Japan for trial for an alleged offense over which that Government has no jurisdiction, nor does it have jurisdiction over

the person of the petitioner. He further alleges that his detention is illegal and in violation of the Constitution and laws of the United States, as well as the treaty rights and obligations of the Government of the United States, and that the reasons for his detention and proposed delivery to the Japanese Government are invalid in law and in violation of fundamental constitutional and legal rights of petitioner.

The petitioner is a Specialist Third Class in the Regular Army of the United States, assigned to Company F, 8th Cavalry Regiment, at Camp Whittington, Honshu, Japan, having reenlisted while in Japan on October 28, 1954, for a period of three years.

On January 30, 1957, an incident occurred while the petitioner was on a firing range known as Camp Weir Range in Japan, resulting in the death of a Japanese woman for which the American military authorities propose to deliver petitioner to the Japanese Government for trial.

The incident is succinctly described in the certificate of the petitioner's commanding officer dated February 7, 1957, from which the following is quoted:

> "* * * I certify that GIRARD, William S. RA16452809, Specialist Third Class, Company F, 8th Cavalry Regiment, APO 201, was in the performance of his official duty at 1350 hours, 30 January 1957, Camp Weir Range Area, when he was involved in the following incident: On 30 January 1957, 2nd Battalion, 8th Cavalry Regiment, was engaged in routine training at Camp Weir Range Area. Company F was conducting blank firing exercises. Specialist Third Class William S. GIRARD was instructed by his platoon leader to move near a position near an unguarded machine gun to guard the machine gun and items of field equipment that

were in the immediate area. GIRARD, following instructions, moved to the designated position near the machine gun. While performing his duties as guard, he fired an expended cartridge case, as a warning, which struck and killed SAKAI, Naka, Kami-Shinden, Somamura, Gumma Prefecture, who had entered the range area for the purpose of gathering expended cartridge cases."

This certificate has never been withdrawn or modified in any respect.

The Security Treaty between the United States of America and Japan which entered into force on April 28, 1952, provided by Article III thereof that:

"The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments."

Article XVII of the Administrative Agreement subsequently entered into between the Governments of the United States of America and Japan, defines the offenses of which the countries have concurrent jurisdiction and exclusive jurisdiction, respectively.

Paragraph 3 of Article XVII provides that with respect to cases where the right to exercise jurisdiction is concurrent, the military authorities of the United States shall have the *primary right* to exercise jurisdiction over the members of the United States armed forces or the civilian component *in relation to offenses arising out of any act or omission done in the performance of official duty.* (Italics supplied.)

The Agreed Official Minutes regarding this provision in Paragraph 3 provide that where a member of the United States armed forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that

the alleged offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

It was pursuant to these Official Minutes that the certificate of the petitioner's commanding officer was issued dated February 7, 1957.

The certificate by the commanding officer which was directed to the Chief Procurator, Maebashi District, Maebashi City, Honshu, Japan, continued by stating: "The United States will exercise jurisdiction in this case unless notification is given immediately that proof to the contrary exists."

Thereafter, on February 9, 1957, the Chief Procurator notified the petitioner's commanding officer with reference to his certificate as to official duty that "This office considers the proof contrary thereto exists, basing upon our examinations."

Following this exchange, there were discussions commencing in early March, 1957, by the representatives of the United States and representatives of Japan constituting a Joint U. S.—Japan Committee. On May 16, 1957, the United States representative on the Committee agreed that the United States would not exercise its asserted right of primary jurisdiction in this case. This action is said to have been taken in accordance with Paragraph 3 (c) of Article XVII of the Administrative Agreement, which reads as follows:

> "If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in

cases where that other State considers such waiver to be of particular importance."

Thereafter, on June 4, 1957, the Secretary of State of the United States and the Secretary of Defense of the United States who are named as two of the defendants in this action, issued a joint statement that they had carefully reviewed all of the available facts in this case, and have now concluded that the agreement that the petitioner be tried in the courts of Japan was reached in full accord with procedures established by the Treaty and Agreement, and that in order to preserve the integrity of the pledges of the United States, this determination by the Joint Committee must be carried out.

This joint statement related the circumstances substantially the same as, but in more detail than, those contained in the certificate by the petitioner's commanding officer. The following is quoted from the joint statement:

"* * * * * *

"The incident occurred in a maneuver area provided by the Japanese Government for part-time use of United States forces. The Japanese Defense Force uses the same area about 40% of the time. When the area is not in use by either the United States or Japanese armed forces, Japanese civilians are permitted to farm or otherwise use the area.

"Efforts to keep civilians away from the area during such military exercises have not proved effective. In this particular case, red boundary flags were, as customary, erected as a warning to civilians to keep off, and local authorities were notified of the proposed exercises. But, as was frequently the case, a number of Japanese civilians were in the area gathering empty brass cartridge cases at the time of the incident. These civilians had created such a risk of injury

to themselves in the morning exercises when live ammunition was used that the American officer in charge withdrew live ammunition from the troops prior to the afternoon exercises. In the interval between two simulated attacks during the afternoon, Girard and another soldier, Specialist 3rd Class Victor M. Nickel, were ordered by their platoon leader, a Lieutenant, to guard a machine gun and several field jackets at the top of a hill. Girard and Nickel were not issued live ammunition for this duty.

"It was while these soldiers were performing this duty that the incident occurred. Mrs. Naka Sakai, a Japanese civilian, died a few moments after being hit in the back by an empty brass rifle shell case fired by Girard from his rifle grenade launcher. She was not over 30 yards from Girard and was going away from him when he fired the rifle. Girard had previously fired similarly in the vicinity of a Japanese man, who was not hit.

"Girard's action in firing empty shell cases from the rifle grenade launcher was not authorized. He asserted that he fired from the waist, intending only to frighten the Japanese civilians. Others stated, but Girard denied, that empty shell cases were thrown out to entice the Japanese to approach.

"* * * * *"

The joint statement relates that "The Commanding General of Girard's Division certified that Girard's action was done in performance of official duty".

The joint statement further relates that during the course of the meetings between the United States and Japanese representatives, while consideration was given to referring the matter in dispute to the two Governments for settlement, this procedure was rejected as inadvisable under the circumstances, and instructions were issued that the United States representative on the Joint Committee should continue to

press the claim for jurisdiction, but that, in case of continued deadlock, the United States representative was authorized to waive jurisdiction to Japan. After three weeks of additional negotiations "The U. S. representative waived jurisdiction in the name of the United States."

Thereafter, Girard was indicted by the Japanese judicial authorities for causing a death by wounding and at the present time he is administratively restricted to the limits of Camp Whittington.

The joint statement of the Secretaries was released on June 4, 1957 and the petition for Writ of Habeas Corpus was filed in this Court on June 6, 1957; an Order to Show Cause was issued the same day returnable on June 11, 1957, to which the respondents made return with accompanying exhibits, and the cause submitted for decision after full argument.

The decision of this case does not determine the guilt or innocence of the petitioner. The issue here is what tribunal should determine that question, and does the petitioner have a consfitutional right which would be violated if he should be delivered to the Japanese Government for trial.

Nor is the question whether or not the petitioner would receive a fair trial if delivered to the Japanese Government for trial.

An affidavit of the General Counsel, Department of Defense, details the experience of the three United States Armed Services in Japan since the effective date of the Administrative Agreement in Japan and states that in a few instances suggestions of possible infringement of the rights of the accused have been made by an observer; that subsequent investigation by the Field Commander of the accused's has, in each instance, refuted or dispelled the suggestion and to date there has been no instance of the exercise by

Japan of criminal jurisdiction over United States personnel in which the conduct of the proceedings has disclosed a basis for diplomatic intervention.

On the basis of this experience, it is assumed that the petitioner would receive a fair trial if the defendants should deliver the petitioner to the Japanese Government for trial under the Japanese Constitution and laws.

The question which this Court must decide is whether the petitioner has a right under the Constitution of the United States to be tried for the alleged offense in an appropriate American tribunal and would that constitutional right be violated if he is delivered to the Japanese Government for trial.

It is uncontroverted that the petitioner at the time of the alleged occurrence was acting as a member of the American armed forces in the performance of his official duties as guard.

The certificate of the petitioner's commanding officer relates that petitioner "was instructed by his platoon leader to move near a position near an unguarded machine gun to guard the machine gun and items of field equipment that were in the immediate area"; that petitioner *"following instructions,* moved to the designated position near the machine gun" and *"while performing his duties as guard"* he fired the expended cartridge case. (Italics supplied.)

The joint statement issued by the Secretary of State and the Secretary of Defense, after relating the guard duty assigned to the petitioner and another soldier, states *"It was while these soldiers were performing this duty that the incident occurred."* The joint statement further says that "the Commanding General of Girard's division certified that Girard's action was done in performance of official duty". (Italics supplied.)

At the hearing on the Petition and the defendants' return to the Order to Show Cause, and on defendants' Motion to Quash Subpoenas issued by the petitioner, the United States Attorney stated it could be assumed "that the offense arose out of an incident, an act or omission in the performance of an official duty". Subsequently, the following colloquy ensued:

"The COURT. Mr. Gasch, you say let's assume certain facts. Is the government conceding those facts. I am assuming that your argument is addressed primarily at this stage to the motions to quash.

"Mr. GASCH (United States Attorney). Yes, Your Honor.

"The COURT. The Court, in passing on the motions to quash, has to know what the issues of fact are. Now, when you say let's assume he was acting in an official capacity or, in the language of the agreement, 'offenses arising out of any act or omission done in the performance of official duty', is the government conceding that at the time he came within the purview of this language?

"Mr. GASCH. You Honor, I don't think this is a question in which I dispute or a case in which I dispute that interpretation of the facts.

"The COURT. What I am trying to make clear is this: It seems to me that in passing on the motions to quash, I have got to know what are the issues of fact in this case and what is agreed to and what isn't agreed to.

"Mr. GASCH. Very well, Your Honor, let's say as far as the government is concerned, those are the facts.

"Mr. CARROLL (Counsel for Petitioner). What are the facts, Your Honor? I don't understand.

"The COURT. The Court understands the concession by the government to be that at the time of the alleged offense by the petitioner, it

arose out of an act or omission done in the performance of official duty. Is that correct?

"Mr. GASCH. *That is correct.*" (Italics supplied.)

If there had been any disagreement as to this material and basic fact, the Court would have been required to issue the Writ in order that a full hearing could be held to determine the fact. In resisting the argument of petitioner's counsel that the Writ should issue, counsel for the defendants insisted that there is no material issue of fact.

Accordingly, the determination of the legal question here to be decided will be based upon the conceded fact that the incident for which it is proposed to deliver the petitioner to the Japanese courts for trial arose out of an act or omission done by the petitioner as a member of the American armed forces in the performance of official duty.

Section 8 of Article I of the Constitution of the United States provides that the Congress shall have power "to make Rules for the Government and Regulation of the land and naval Forces".

Acting under this authority, the Congress has adopted a Uniform Code of Military Justice, 50 U. S. C. A. 242, which makes subject to its provisions "all persons belonging to a regular component of the armed forces".

This Code, as its name implies, is a comprehensive Criminal Code applying to the persons subject to its provisions and spells out in detail the procedures for the Courts-Martial jurisdiction, appointment and composition of Courts-Martial, pre-trial and trial procedure, sentences, review of Courts-Martial, and definition of offenses punishable under the Code. In other words, if the petitioner is subject to prosecution for an act or omission done by him as a member of

the American Armed Forces in the performance of official duty, the Uniform Code of Military Justice establishes every procedure to be followed.

Since the petitioner's act was committed in the performance of official duty, under the principles announced by the Supreme Court in the case of *In Re Neagle*, 135 U. S. 1, the petitioner is accountable only to United States Federal jurisdiction for any act or omission. Additional authorities in support of this proposition are *Johnson* vs. *State of Maryland*, 254 U. S. 51; *Brown* vs. *Cain*, 56 F. Supp. 56; *Lima* vs. *Lawler*, 63 F. Supp. 446; *Colorado* vs. *Maxwell*, 125 F. Supp. 18; *In Re Fair, et al.*, 100 Fed. 149; *In Re Wulzen*, 235 Fed. 362.

In some of these cases, the factual situation was in dispute and required lengthy hearings to determine if the petitioner was acting in performance of official duty. Not so in the instant case, since the status of the petitioner is conceded.

The defendants placed reliance upon the decisions of this Court in the cases of *May* vs. *Wilson*, C. A. No. 128–56, D. C., D. C.; and *Cozart* vs. *Wilson*, 98 U. S. App. D. C. 437, 236 F. 2d, 732. Both of these cases arose out of offenses committed when the petitioners were off duty and, therefore, factually are distinguishable from the case now under consideration. *May* was not appealed, and in *Cozart* the Supreme Court granted a Petition for Writ of Certiorari and vacated the judgment of the Court of Appeals, remanding the case to the District Court with directions to dismiss the petition for Writ of Habeas Corpus upon the ground that the cause is moot. 352 U. S. 884. In pursuing this procedure, the Supreme Court cited *United States* vs. *Munsingwear, Inc.* 340 U. S. 36, which states "that procedure clears the path for future relitigation of the issues between the parties and

eliminates a judgment, review of which was prevented through happenstance."

Counsel for the defendants also cite cases in support of the proposition that "the jurisdiction of a Court-Martial is not exclusive and does not preempt the jurisdiction of state courts to deal with acts which violate state law as well as military law."

In none of the cases cited in support of this proposition were the accused charged with an offense performed in line of duty.

In *Caldwell* vs. *Parker*, 252 U. S. 376, the petitioner was charged with murder of a civilian at a place within the jurisdiction of the State of Alabama and not within the confines of any camp or place subject to the control of the civil or military authorities of the United States. *Kennedy* vs. *Sanford*, 166 F. 2d 568, related to a charge of conspiracy; *United States* vs. *Matthews*, 49 F. Supp. 203, was a charge of rape; and *United States* vs. *Canella*, 63 F. Supp. 377, related to a charge of bribery. Clearly these cases are distinguishable from the facts in the instant case.

Counsel for defendants further cite a series of cases in support of the proposition that "if there is any question as to whether a particular act was strictly within the scope of the authority of the soldier or whether such act constituted the only means available to perform the assigned duty, then the state court rather than a court-martial must be allowed to proceed with the case." These decisions are not in point in view of the stipulation that there is no issue of material fact with respect to the status of the petitioner at the time of the incident.

Applying the same constitutional protection to the petitioner against his delivery to a foreign State that would be applied to his delivery for prosecution in a state court, it follows that the threatened action by

the defendants is illegal and in violation of the Constitution and laws of the United States.

The petition is for a Writ of Habeas Corpus which appears to be authorized by *Cozart* vs. *Wilson, supra,* and *Eisentrager, et. al.* vs. *Forrestal,* 84 U. S. App. D. C. 396, 174 F. 2d 961, since the petitioner is administratively restricted to the limits of Camp Whittington and, therefore, he is sufficiently restrained for the purposes of habeas corpus. However, since the petitioner remains a member of the United States Armed Forces in Japan and may be prosecuted in Court-Martial proceedings for the offense with which he is charged, the petition for the Writ will be denied and the Court will treat the complaint as a Petition for Declaratory Judgment and Injunction under the prayer of the complaint for other relief and, as such, will decree that the proposed delivery of the petitioner to the Japanese Government would violate rights of the petitioner guaranteed by the Constitution of the United States and will be enjoined.

This opinion may be treated as the Court's Findings of Fact and Conclusions of Law, and counsel for petitioner will submit an appropriate order in conformity herewith.

Joseph C. McGarraghy,
(sgd) JOSEPH C. MCGARRAGHY,
Judge.

JUNE 18, 1957.

In the United States District Court for the District of Columbia

H. C. 47–57

WILLIAM S. GIRARD, PETITIONER

v.

CHARLES E. WILSON, ET AL., RESPONDENTS

ORDER

This matter having come on for hearing upon the petition for writ of habeas corpus and the Court having considered the petition, the Return and Answer to Rule to Show Cause and all the exhibits filed herein, and after a full and fair hearing having been accorded the parties thereto, it is by the Court this 18th day of June, 1957,

ORDERED, that in accordance with the Opinion filed this date, the petition for writ of habeas corpus is denied, the rule to show cause is discharged, and that respondents and those over whom they exercise command function be, and they hereby are, enjoined from delivering petitioner to the Japanese Government.

(s) JOSEPH C. MCGARRAGHY, *Judge*.

APPENDIX C

STATEMENT OF THE SECRETARY OF DEFENSE

I, Charles E. Wilson, Secretary of Defense, make this statement for submission to the Supreme Court of the United States in connection with the case of *Girard* v. *Wilson et al.*

1. I am acquainted with the decision of the District Court of the District of Columbia in the case of *Girard* v. *Wilson et al.*, and with the order issued by that Court with respect to Specialist Third Class Girard, restraining me as Secretary of Defense and those over whom I exercise command function "from delivering petitioner to the Japanese Government."

2. The Department of State at the instance of the Department of Defense has negotiated numerous agreements with foreign nations dealing with the exercise of jurisdiction by United States courts martial within the territorial jurisdiction of those foreign countries. Chief among these agreements is the Agreement Between the Parties To the North Atlantic Treaty Regarding the Status of Their Forces. Another such agreement is the Protocol to Amend Article XVII of the Japanese-United States Administrative Agreement, which is similar to the NATO Status of Forces Agreement as to criminal jurisdiction provisions. There are also numerous other international agreements which deal with the same problem of criminal jurisdiction. In the negotiation of these agreements, we have been deeply conscious of our obligation to secure fair and impartial treatment for all members of our Armed

Forces serving overseas, with due regard, however, to the need for proper observance of the laws of the countries in which they serve.

3. The decision and order of the District Court in the case of *Girard* v. *Wilson et al.* questions the validity of certain important operating provisions of these agreements and, in particular, the provisions of paragraph 3 (c) of Article XVII of the Japanese-United States Administrative Agreement. According to the records maintained by the Department of Defense, during the three-year period ending November 30, 1956, over 32,000 cases involving personnel of the Department of Defense arose which were subject to the primary jurisdiction of foreign courts. Through the application of the waiver provisions of the pertinent agreements, such as paragraph 3 (c) of Article XVII of the Japanese-United States Administrative Agreement, foreign governments waived their jurisdiction in about 73% of all the cases. The waiver provisions of these agreements are therefore of great significance in the practical administration of the Armed Forces overseas.

4. The implications of the decision of the District Court in the case of *Girard* v. *Wilson et al.* are such that an early resolution of the legal issues raised is essential to the carrying out of the status of forces agreements throughout the world. The very large number of cases involved and the necessity of seeing that justice is dispensed without undue delay require that the legal issues raised in the case of *Girard* v. *Wilson et al.* be resolved quickly. Moreover, failure to secure prompt resolution of these problems may disrupt discipline by causing the premature commencement of numerous legal action to test the propriety of administrative decisions made in other cases

in carrying out existing treaties and other international agreements.

5. According to the records of the Department of Defense, Specialist Third Class Girard's term of enlistment in the Regular Army will expire on October 27, 1957. Unless there is a resolution of the issues raised in the case of *Girard* v. *Wilson et al.* before that date, additional legal complications, I am informed, may well arise. It is of great importance that the ability of this country to carry out obligations assumed with respect to another nation should not be affected by any change of Girard's status.

6. During the year ending November 30, 1956, the Japanese Government waived its primary jurisdiction in over 5400 cases involving American military personnel—an average of over 100 a week. Inability to carry out our commitment in the *Girard* case may well in the next month or two affect hundreds of new cases in which otherwise Japan would be expected, under its past policy, to grant waivers of its primary jurisdiction. A substantial number of these might, therefore result in confinement in Japanese prisons, thus placing a serious strain on relations between the two governments and jeopardizing the very satisfactory military and political arrangements that have been established between them.

(Sgd) C. E. Wilson,
CHARLES E. WILSON,
Secretary of Defense.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1103

CHARLES E. WILSON, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

WILLIAM S. GIRARD, UNITED STATES ARMY SPECIALIST 3/C

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the District Court has not yet been reported. It is reproduced in Appendix B, *infra*, pp. 38a–50a.

JURISDICTION

The order of the District Court denying the petition for a writ of habeas corpus but granting declaratory relief and an injunction against petitioners was entered on June 18, 1957 (Appendix B, *infra*, p. 51a). A notice of appeal to the Court of Appeals for the District of Columbia Circuit was filed on June 18, 1957, and the appeal was docketed in that court on the same day. The case has not been heard, submitted to,

or decided by the Court of Appeals. A petition for a writ of certiorari was filed on June 20, 1957; a cross-petition by respondent was filed on June 21, 1957, No. 1108, Oct. Term, 1956. Both petitions were granted on June 21, 1957. The jurisdiction of the Court rests on 28 U. S. C. 1254 (1) and Rule 20 of the Rules of this Court.

QUESTION PRESENTED

Pursuant to treaty, Japan and the United States have entered into an agreement under which the United States may exercise court-martial jurisdiction within Japan over certain offenses committed there by American servicemen, but may also determine not to exercise its right to try such offenses and may remit the serviceman to a Japanese court for violation of the local law. In this case, the United States has determined not to exercise its right to try respondent by court-martial, and is prepared to remit him for trial under the law of the local sovereign, Japan. The question presented is:

Whether a United States court should review and reverse the decision of the Government that respondent should not be tried by court-martial and that the Japanese courts may try him for conduct in Japan resulting in the death of a Japanese national.

TREATIES, AGREEMENTS, AND STATUTES INVOLVED

Paragraph 3 of the Protocol amending Article XVII of the Administrative Agreement under the Security Treaty between the United States and Japan reads as follows:

> In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> * * * * *
>
> (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

The full text of the Protocol and of the Security Treaty and excerpts from other relevant documents are reproduced in Appendix A, *infra*, pp. 3a–37a.

Article 14 of the Uniform Code of Military Justice, 10 U. S. C. (Supp. IV) 814, provides in pertinent part:

> (a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.
>
> * * * * *

Article 5 of the Uniform Code of Military Justice, 10 U. S. C. (Supp. IV) 805, provides:

> This chapter applies in all places.

STATEMENT

On January 30, 1957, members of a United States military unit in Japan were engaged in exercises involving live ammunition. Because of the large

number of Japanese civilian nationals present in the area, live ammunition was withdrawn and blank ammunition substituted. During an interval in the maneuvers, respondent Girard, a Specialist 3rd Class (equivalent to sergeant), and another soldier, one Nickel, were ordered to guard a machine gun and some field jackets that had been left on the far side of a hill.

Girard had a grenade launcher on his rifle. He had been armed with the same weapon during the morning exercises in which he had participated and during which he had fired some 80 rounds of ball ammunition. After the two soldiers had arrived on the ridge, Girard, on two occasions, placed an expended .30 calibre cartridge case in the grenade launcher and projected it by firing a blank. The second shot struck Mrs. Naka Sakai, a Japanese woman, who had been gathering expended brass cartridge cases and was not over 30 yards away from respondent. The casing penetrated her back and caused her death.

The incident occurred in a maneuver area provided by the Japanese Government for part-time use of United States forces. The Japanese Defense Force uses the same area about 40 percent of the time. When the area is not in use by either the United States or Japanese armed forces, Japanese civilians are permitted to farm or otherwise use the area.

There were conflicting accounts of the circumstances of the shooting; the available statements of Girard and the other eye-witnesses (including Nickel, re-

spondent's fellow-soldier) are far from harmonious. See the "Affidavit With Respect to Facts", dated June 8, 1957, by General Counsel Dechert of the Department of Defense, which was filed in the District Court and is part of the record in this Court.[1] In particular, some witnesses stated that the soldiers had thrown brass casings onto the ground and indicated that it was all right for the civilians to pick them up.[2]

Whatever the true facts, the Government has agreed that, for the purposes of the present stage of this litigation and only for that purpose, the killing may be deemed to have arisen out of an act done in the performance of official duty—as contended by respondent—but the Government has never agreed, nor has respondent contended, that he was ordered to use his gun in this fashion.

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[1] This affidavit was offered by the Government under seal solely because the material contained therein might be prejudicial to respondent's defense if he is to be tried either by a Japanese court or by a court-martial. The Government has no other reason for keeping the affidavit under seal. The District Court accepted it under seal, and maintained it in that condition.

[2] The joint statement by the Secretaries of State and Defense, issued June 4, 1957, to which respondent refers in his petition for a writ of habeas corpus, states that the Secretaries' review of the matter disclosed, among other things, that Mrs. Naka Sakai "was not over 30 yards from Girard and was going away from him when he fired the rifle. Girard had previously fired similarly in the vicinity of a Japanese man, who was not hit. * * * [Girard] asserted that he fired from the waist, intending only to frighten the Japanese civilians. Others stated, but Girard denied, that empty shell cases were thrown out to entice the Japanese to approach."

On February 7, 1957, Girard's commanding officer filed a certificate of official duty with the local Japanese authorities, *i. e.*, a certificate that the killing had arisen out of an act done by respondent in the performance of his official duty. Two days later, the local Japanese authorities notified the United States commanding officer who had issued the certificate that they considered that proof contrary to the certificate existed. The matter was referred to the Joint Committee which was established by Article XXVI of the Administrative Agreement (Appendix A, *infra*, pp. 18a–19a) under Article III of the Security Treaty between the United States and Japan (Appendix A, *infra*, p. 11a).

In the Criminal Jurisdiction Subcommittee of the Joint Committee, to which the matter was referred, both countries agreed that the killing of a Japanese woman was an offense against Japanese law as well as an offense against United States military law, and that, therefore, under Article XVII of the Administrative Agreement (as amended by the Protocol signed September 29, 1953) (Appendix A, *infra*, p. 23a–25a) the two countries had concurrent jurisdiction. The United States took the position that the offense was one

> arising out of any act or omission done in the performance of official duty,

and that therefore this was a case in which the United States had the primary right to exercise jurisdiction, as provided in Paragraph 3 (a) (ii) of Article XVII (Appendix A, *infra*, p. 25a). Japan took the position that the offense was *not* one arising out of an act

done in the performance of official duty—because respondent's action in firing the shell cases was said to be outside of the scope of his guard duty—and that therefore Japan had the primary right to exercise criminal jurisdiction under Paragraph 3 (b) of Article XVII (Appendix A, *infra*, p. 25a).

The issue continued unresolved by the Joint Committee from early March until mid-May 1957, when the United States representatives on the Joint Committee were authorized to agree that Japan could exercise jurisdiction over respondent. It was agreed in the Joint Committee that United States military authorities would notify the appropriate Japanese authorities, in accordance with Paragraph 3 (c) of the Protocol amending Article XVII of the Administrative Agreement,[1] that the United States had decided not to exercise whatever jurisdiction it might have in the case. This action was thereafter taken. The certificate of official duty has not been withdrawn.

Respondent was indicted by Japan on May 18, 1957, for the offense of causing a death by wounding, the least serious homicide charge for which he could have been indicted under Japanese law.

The decision of the United States not to exercise jurisdiction over respondent and to agree that Japan

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[1] Paragraph 3 (c) provides (Appendix B, *infra*, p. 25a):

"If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

could exercise criminal jurisdiction over him was reviewed by the Secretary of Defense and the Secretary of State who concluded that it should be carried out. This decision was approved by the President. See the affidavit of Secretary of State Dulles, dated June 10, 1957, filed in the District Court, and a part of the record in this Court.[4] Public announcement of

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[4] The Secretary's affidavit states:

"* * * * * *

"3. Together with Charles E. Wilson, Secretary of Defense, I reviewed the facts with respect to a prior agreement of the Joint United States-Japan Committee established under the Security Treaty with Japan and the Administrative Agreement entered into thereunder, as amended, that petitioner Girard be tried in the courts of Japan for actions which caused the death of Naka Sakai, a Japanese national, on January 30, 1957. After such review and due consideration of the terms of the applicable Treaty and Agreement, Secretary Wilson and I concluded that the Joint Committee's agreement that Girard be tried in the courts of Japan was reached in full accord with procedures established by the Treaty and the Agreement. We decided that in order to preserve the integrity of the pledges of the United States, this determination should be carried out. In addition we concluded that any prolongation of the dispute over this jurisdictional issue might well have serious consequences upon United States relations not only with Japan, but also with many other nations.

"4. Because of the imperative public importance of the matter, this joint conclusion of the Secretary of State and the Secretary of Defense was discussed with and confirmed by the President. It was then communicated to the Government of Japan. Public announcement thereof was made and it has come to the attention of other governments with which the United States has agreements relating to the exercise of criminal jurisdiction over American forces.

"5. This case is widely regarded abroad as a test of this Government's willingness and ability to honor a national commitment openly arrived at, and duly confirmed by the Secretaries of State and Defense. This is of particular importance

this determination was made on June 4, and it was communicated to the Government of Japan.

On June 6, 1957, respondent filed this petition for a writ of habeas corpus in the District Court for the District of Columbia. On the same day that court entered an order directing petitioner Wilson and others to show cause why the writ should not issue. It was further ordered:

> * * * pending hearing and determination of this application that the person of the Petitioner, William S. Girard, be not delivered to custody or control of any foreign government or power.

Return and answer to the rule to show cause was filed on June 10, 1957, and on June 11 the District Court heard argument. The court ruled that there was no material fact in issue on the record as it stood. On June 18, 1957, the District Court issued its order deny-

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when the commitment relates to jurisdiction to try members of our armed forces for crimes committed within the sovereign jurisdiction of friendly nations—under agreements which are substantially more favorable to United States jurisdiction than generally recognized principles of international law with respect thereto.

* * * * *

"8. Because of the wide publicity that this proceeding has received, public opinion in Japan has been aroused. Any inability on the part of the United States officials concerned to honor this Government's commitment to permit Girard to be tried in the Japanese courts, particularly any such inability by reason of a temporary injunction or stay order pending final determination—will in my judgment give rise to serious difficulties in our relations with the Government and people of Japan and may involve risk of injury to United States personnel located in Japan."

ing the petition for habeas corpus but granting declaratory relief and issuing an injunction against petitioners from delivering respondent to the custody of the Japanese Government. Appendix B, *infra*, pp. 38a–51a. A notice of appeal was filed on June 18, 1957, and the record was docketed in the Court of Appeals on the same day. A petition for a writ of certiorari was filed by the Government on June 20, 1957, and was granted on June 21, 1957.

SUMMARY OF ARGUMENT

I

Under international law, which is part of the law of the United States, respondent has no immunity from Japanese criminal jurisdiction except that accorded him under the agreements between the United States and Japan. Apart from those agreements, respondent is wholly subject, under international law, to the jurisdiction of Japan on whose soil he performed the acts which are now charged as an offense against Japanese law.

A. 1. Under the only acceptable rule of international law—the only one recognized by sovereign nations—the territorial sovereign has plenary jurisdiction, and there is no immunity for visiting troops except to the extent that the local sovereign expressly or impliedly agrees. The right to exercise jurisdiction over such troops is a matter for negotiation between the two states. This is the position which the United States has accepted and which is overwhelmingly supported by international practice and court decisions. Therefore, unless respondent

can claim rights under the arrangement with Japa
(which we discuss in Point II, *infra*), he has no d
fense whatever against the exercise by Japan of i
jurisdiction.

2. The Court should confirm this rule of intern
tional law, adopted by the branches concerned wi
foreign affairs. In the area of foreign relations, t
uniform teaching of the Court's rulings is that t
judiciary should not go counter, if at all possible, to
definite position taken by the Executive *vis-à-vis* fo
eign countries. Here, the executive position is re
sonable and supportable; we believe it to be whol
correct. We submit that the court can accept it wit
out determining the issue for itself.

B. Respondent relies upon statements by vario
theorists to the effect that visiting friendly force
should be entitled to an immunity, but even the
statements do not support respondent's position in th
case. In the first place, it is universally agreed tha
whatever immunity might exist in the absence of sp
cific agreement, it can always be supplanted by
express agreement between the two sovereigns. Th
is the precise situation here. Japan and the Unit
States have agreed to an arrangement under whi
American troops do not have full immunity, and wh
immunity they have can be waived by the Unit
States. Respondent cannot, therefore, rely on a
principle of immunity under international law.

Secondly, it is also universally agreed that ev
expressly granted immunity—and *a fortiori* any i
munity arising by implication—is for the benefit

the state, not the individual, and it may always be waived by the state with or without the consent of the individual. The practice with respect to diplomats makes this clear *a fortiori;* diplomatic immunity may be, and has been, waived by the government over the objection of the diplomat. The same rule has been applied to servicemen. Accordingly, respondent—as to whom any immunity has been duly waived—has now no conceivable claim under international law.

II

By international arrangement with Japan, the United States has acquired a discretionary right to exercise criminal jurisdiction in that country in certain categories of cases, but in no case is United States jurisdiction mandatory and this country may always determine not to exercise its jurisdiction in favor of the jurisdiction of Japan. In respondent's case, the United States has duly decided not to exercise such jurisdiction as it may have had.

A. Our international arrangement with Japan is contained in three basic documents—the Security Treaty, the 1952 Administrative Agreement, and the 1953 Protocol amending the Administrative Agreement. The Security Treaty explicitly authorized (in Article III) the United States and Japan to enter into "administrative agreements" relating to the "conditions which shall govern the disposition of armed forces of the United States of America in and about Japan." The Administrative Agreement, drawn up and concluded under this provision of the Security Treaty, provided that, with

the coming into force of the NATO Status of Forces Treaty, the United States, at the option of Japan, would conclude with Japan an agreement on criminal jurisdiction similar to the corresponding provisions of the NATO Status of Forces Treaty. Pursuant to that obligation, and at the request of Japan, in 1953, a Protocol was concluded which amended the Administrative Agreement to incorporate the jurisdictional provisions of the NATO Status of Forces Treaty.

Under this arrangement, Japan and the United States have concurrent jurisdiction to try members of the United States Forces for conduct, as here, which constitutes an offense both under Japanese law and under the Uniform Code of Military Justice. Where the offense is one "arising out of any act or omission done in the performance of official duty," the United States is given the "primary" right to exercise jurisdiction; for offenses not arising out of an act done in the performance of official duty and not involving solely United States personnel or property, Japan retains the "primary" right to exercise jurisdiction. But it is specifically provided in Paragraph 3 (c) that the state having the primary right may decide not to exercise jurisdiction or may waive its jurisdiction; if that is done, the other state may conduct a trial and, if the defendant is found to have committed the alleged offense, may impose punishment. The state with primary jurisdiction is required to give "sympathetic consideration" to a request for waiver by the other state.

B. This international arrangement between the United States and Japan is valid and binding, both

under the authorization of the Japanese Security Treaty and under the President's powers as the organ of the United States in foreign relations and as commander-in-chief.

1. The authorization in Article III of the Security Treaty to conclude administrative agreements relating to the *conditions* governing the disposition of American troops in Japan provides full support for the instant arrangement on jurisdiction. The obvious aim of Article III was to permit subsidiary agreements on all the problems incident to the stationing of our troops in Japan, including taxation, use of facilities, and criminal jurisdiction. That has been the uniform construction of the treaty by both Japan and the United States.

In addition, the fact is that the 1952 Administrative Agreement had been drafted and was considered by the Senate before it consented to the Security Treaty; the Senate specifically rejected a reservation which would have prevented the Agreement from being put into effect without further Senate consent. Similarly, when the NATO Status of Forces Treaty was ratified, the Senate was fully aware that its terms would be automatically extended to Japan, if Japan so desired.

2. Furthermore, the international arrangement is valid as an exercise of the President's authority in the field of foreign affairs and as commander-in-chief. In Appendix C, *infra*, pp. 52a–69a, we discuss in detail the authority of the President to conclude agreements with foreign countries on appropriate subjects. The field of criminal jurisdiction over American

to be within the President's competence. Agreements comparable to the instant arrangement have in the past been concluded in peace time with Mexico (in 1882), and with Denmark and Great Britain (in 1941).

C. Paragraph 3 (c) of the agreement with Japan expressly provides that the state with "primary" jurisdiction may always waive it, and "shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance". It was under these explicit provisions of Paragraph 3 (c) that the United States determined to waive any right to exercise its jurisdiction, and to accede to Japan's request that that state exercise its own jurisdiction. This determination was confirmed by the Secretaries of State and Defense and by the President.

Paragraph 3 (c) is an integral part of the international arrangement and is identical in terms with Article VII of the NATO Status of Forces Treaty. To hold that the United States must exercise jurisdiction in all those instances in which it possesses "primary" jurisdiction would be wholly to nullify the waiver provisions of that paragraph—for they can apply only in those cases where a state *does* have primary jurisdiction—and to excise it from the agreement. It is under this paragraph that the Japanese authorities have waived their primary jurisdiction in 97% of the cases in which Japan has had such primary jurisdic-

tion.[5] If the paragraph is invalid or inoperative, no such reciprocity is likely to continue; the conditions of the arrangement would be drastically altered.

III

A. Having demonstrated (1) that Japan could try respondent in the absence of a treaty or agreement containing contrary provision, and (2) that Japan could agree to refrain from exercising its jurisdiction over United States nationals in specific cases, we reach the question whether there is a defect in the agreements here involved insofar as they leave room for the exercise of an executive discretion. More specifically, the question is whether American law poses an objection to Paragraph 3 (c) of the Protocol, under which the executive has waived whatever right to try respondent was accorded the United States under other provisions of the agreements.

Since the United States is, itself, a nation of multiple sovereignties, the waiver of jurisdictional prerogatives is a commonplace in our law. The federal government and the several states, and the individual states in their relations *inter sese*, have long cooperated to the end that each may effectively exercise jurisdiction within its own sphere. In *Ponzi* v. *Fessenden*, 258 U. S. 254, the petitioner was under sentence of a federal court and the United States had

[5] Taking all countries with a comparable international arrangement with this country, the waivers by the foreign states of their "primary" jurisdiction amounted to 73% of all the cases in the three-year period ending November 30, 1956.

the right to keep him in its exclusive custody until the completion of his jail term. Yet, this Court held that, even in the absence of express statutory authorization, the Attorney General could make the prisoner available to the State of Massachusetts for trial of alleged violations of state law. Emphasizing the vital need for "reciprocal comity" (p. 259), the Court declared (p. 260): "He [petitioner] should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it * * *. Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it." Similarly, the Court held in *Roberts* v. *Reilly*, 116 U. S. 80, a case involving interstate rendition, that the petitioner might not complain because Georgia chose to forego the right to charge him for the offense involved and to deliver him to New York, which had concurrent jurisdiction.

The same is true in cases involving international extradition. "It is, of course, within the discretion of the government upon which the demand is made to deliver up the prisoner, notwithstanding that a criminal prosecution is pending against him for a violation of its own laws." (1 Moore, *Extradition*, Sec. 369.) This discretion is the executive's, for while the courts

may determine (on application for *habeas corpus*) whether a treaty of extradition covers the case, once this is determined, the ultimate decision whether to issue an executive warrant to surrender or to refuse the request of the demanding state rests with the head of state.

The instant case is an *a fortiori* one. It does not involve rendition or extradition, but, rather, the act of making the accused available for trial in the country where he is now actually present and in which the alleged offense was committed.

In light of the international agreement, which expressly covers the subject of waiver, and the President's powers, both in the conduct of foreign affairs and as commander-in-chief, it seems plain that no congressional authorization is required. But if that were required, it, too, is present. The Uniform Code of Military Justice provides that the executive may make military personnel available for trial by civil authorities. This authorization applies both at home and abroad. Articles 5, 14, *supra*, p. 3.

B. The conduct of military and foreign affairs falls within the exclusive power of the political branches of our government. The decision to waive jurisdiction over respondent and to remit him to Japanese authorities is one intimately related to the conduct of these affairs. There are no judicial standards by which it can be tested. Like "decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, [it is] not open to judicial revision . . .." *Terlinden* v. *Ames*, 184 U. S. 270, 290.

C. Even if there were some room for limited judicial review, it would be clear that there has been no abuse of discretion. There had been prolonged dispute as to whether Japan or the United States had primary jurisdiction. Japan's views as to the meaning of "official duty", as used in the agreements, is not without support. There was further question as to whether a Japanese court did not have the right to make the determination of the question of whether the act done was in the performance of official duty. There were also other important considerations bearing upon the future administration of the agreement with Japan and of similar agreements with other nations. In no event may the decision be deemed unreasonable or capricious.

IV

Since this dispute relates to acts which took place on Japanese soil and which are the subject of an agreement between two sovereign nations, it must of course be resolved by reference to the well-established principles of international law which we discuss under Points I and II, *supra*. But the District Court, ignoring the specific terms of the agreement as well as the basic fact that the shooting took place in Japan, invoked principles of American federalism rather than those of international law and decided the case as if the events had taken place within an American state whose jurisdiction, of course, is subordinate to that of the national government.

The purpose for which resort was had by the court below to the analogy of federal-state relations was to

apply the supposed principle that a federal officer has a personal constitutional right to trial by the United States rather than by any other jurisdiction. However, even within the continental United States no such right exists. The cases relied upon by the District Court to establish the existence of such a right—such as *In Re Neagle*, 135 U. S. 1—turn on specific statutes, inapplicable to this case and designed to insure the supremacy of federal law under Article VI of the Constitution. Thus, where a federal officer is discharged from state custody or is held not to be subject to a state statute, the federal court often proceeds on the assumption that, because federal law is supreme, there can be no violation of state law if the act is performed pursuant to a federal duty. This reasoning is clearly inapplicable where an alleged crime takes place on territory of an entirely independent sovereign, for in such a case the characterization of the act by the foreign, not the American, law will be controlling.

In any event, it is clear that the *habeas corpus* statute held to authorize the discharge of the federal officer in the *Neagle* case is not predicated on any constitutional right personal to the officer. Discharge from state custody has repeatedly been held to rest in the discretion of the federal court, and it is only in an unusual circumstance that the officer is not required to present his claim of a federal defense in the state courts. Were a personal constitutional right in question, discharge would be mandatory, not discretionary.

Respondent therefore has no constitutional right to trial only by a federal court and, moreover, no ap-

plicable statute confers such right upon him. The statute which enables removal of prosecutions against members of the armed forces from state to federal courts, 28 U. S. C. 1442a, is inapplicable by its terms. There is no other legislation which requires that respondent be tried in an American forum, let alone a federal forum.

ARGUMENT

As we stated in our petition for certiorari, the position of the United States on the issues in this case is simple; it rests on the international aspects which the District Court has totally ignored. Under international law, Japan is sovereign within its own country. In the absence of express or implied agreement to the contrary, United States officials within Japan would be obliged to make respondent available to the Japanese authorities for trial there. Thus, if the international arrangements between the United States and Japan are invalid, respondent is plainly subject to the exclusive jurisdiction of Japan and has no claim whatever in American courts. And if, as we assert, the Security Treaty and implementing arrangements are valid, they indisputably authorize the United States, in cases where the jurisdiction of the United States and Japan is concurrent, to waive whatever jurisdiction it may have, including its so-called "primary" jurisdiction. This has been done in a decision approved by the highest executive officers of the Government. Such a waiver—or decision not to exercise jurisdiction—is not a justiciable issue to be decided by a court but a discretionary matter for the Executive Branch.

I

UNDER INTERNATIONAL LAW, RESPONDENT HAS NO IMMUNITY FROM JAPANESE CRIMINAL JURISDICTION EXCEPT THAT ACCORDED HIM UNDER THE AGREEMENTS BETWEEN THE UNITED STATES AND JAPAN

There is only one view of international law that has been accepted by sovereign states regarding the status of foreign troops visiting or passing through a friendly country. It is the rule that has been adopted by the United States and the other nations of the world. This rule is that in the absence of agreement, express or implied, each country has absolute sovereignty within its jurisdiction, and visiting troops have no immunity. It has been suggested by various theorists—whose views are not incorporated in the body of international law—that in the absence of agreement or qualification visiting foreign troops are immune from local jurisdiction for some or all offenses. But one thing is a matter of universal agreement, accepted even by these theorists—that the terms of any immunity from local jurisdiction will be governed by an express agreement entered into by the two countries, and immunity may be waived by the country of which the soldier is a national. Accordingly, respondent's susceptibility to Japanese jurisdiction is governed by the terms of the United States agreement with Japan, and any possible immunity is fully subject to waiver by the United States.

A. Under international law, which is a part of the law of the United States, visiting troops are subject to the unlimited jurisdiction of the local sovereign except to the extent that it expressly or impliedly agrees otherwise

1. The authoritative statement of the principles of international law applicable to respondent's claim of immunity is contained in Chief Justice Marshall's opinion in *The Schooner Exchange* v. *McFaddon*, 7 Cranch. 116, 136, 139:

> The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

See also *United States* v. *Flores*, 289 U. S. 137; *Wildenhus' Case*, 120 U. S. 1.[6]

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[6] *The Schooner Exchange* case has been misconstrued by some as supporting the proposition that there is an immunity under international law for visiting troops. The Court there held that, under the customs and conditions then prevailing, there was *implied* consent that an armed public vessel of a foreign

Following this principle, the United States has adopted the view that each sovereign country has absolute legal authority and criminal jurisdiction within its own territory, and that international law, in and of itself, does not confer any immunity on any group within the country, such as visiting troops of a friendly power. The NATO Status of Forces Agreement, T. I. A. S. 2992, and the instant arrangement with Japan were negotiated upon that basis. See the statement of the Attorney General, before the Senate Foreign Relations Committee, June 24, 1953, Supplementary Hearing before the Senate Foreign Relations Committee on the Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty, 83rd Cong., 1st Sess., pp. 38–56, 65–79, 89; 99 Cong. Rec. 8762–8770; Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 Columbia Law Rev. 1091 (1953). The Attorney General's study considers the various materials and concludes that under international law, as it has been practiced and applied by the nations of the world, friendly foreign forces are

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sovereign would be immune from the jurisdiction of the local courts. But the Court went on to state:

> Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. [7 Cranch at 146.]

Coleman v. *Tennessee*, 97 U. S. 509, and *Dow* v. *Johnson*, 100 U. S. 158, involving the status of soldiers who were members of a belligerent occupation force, and *Tucker* v. *Alexandroff*, 183 U. S. 424, involving the power of American officials under a treaty to arrest a deserter from a foreign navy, contain some overly broad general language but do not affect the holding or reasoning of *Schooner Exchange*.

not immune from the criminal jurisdiction of the state on whose territory they are stationed for crimes committed there against its laws.

We need not here set forth in detail the materials and decisions supporting the Government's view on this point.[7] A few instances will be indicative. The Brussels Treaty Powers Agreement of 1949, 22 Dept. of State Bull. 449–53 (1950), recognized the fullest possible jurisdiction of the host state over the military contingents of the visiting power. The British Allied Forces Act, 1940, 3 & 4 Geo. 6, c. 51 (1940) provided for no jurisdictional immunity for Allied forces on

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[7] See 1 Lauterpacht, Oppenheim's *International Law* (8th ed.) 848–849:

> However, the view which has the support of the bulk of practice is that in principle members of visiting forces are subject to the criminal jurisdiction of local courts, and that any derogations from that principle require specific agreement of the local State by treaty or otherwise.

The American Law Institute's Restatement of the Foreign Relations Law of the United States (Tentative Draft No. 1, April 26, 1957, sec. 18) adopts the same view of international law in providing that the taking of any enforcement action over a state's own troops within the territory of another state without the express or implied consent of that state is a violation of its rights.

See also: Barton, *Foreign Armed Forces: Immunity from Criminal Jurisdiction*, 27 Brit. Y. B. I. L. 186 [1950]; Re, *The NATO Status of Forces Agreement and International Law*, 50 Nw. U. L. Rev. 349; Note, *International Law and Friendly Foreign Forces*, 32 N. Y. U. L. Rev. 351.

British soil.[8] Congress has taken a like view in considering whether to grant immunity to foreign military personnel on American soil. The Senate Judiciary Committee, in reporting out the Service Courts of Friendly Foreign Forces Act, 58 Stat. 643, 22 U. S. C. 701–706, stated that any grant of power to foreign military courts was to be only "of a temporary and conditional nature," and that "The committee do not concede that any foreign military court has more than conditional jurisdiction while on our soil." S. Rep. 956, 78th Cong., 2d Sess., pp. 1, 2. Even this grant of jurisdiction was to be effective only upon a Presidential finding that its "powers and privileges" were necessary. At the time, Congress had before it the British legislation which provided that a member

[8] An exception was subsequently made in favor of American forces (United States of America Visiting Forces) Act, 1942, 5 & 6 Geo. 6, c. 31 (1942)), but the British government considered this to be a considerable departure from the traditional system and practice, tolerable only because of the exceptional circumstances created by the war. Sen. Rep. No. 956, 78th Cong., 2d Sess., p. 4; Barton, *Foreign Armed Forces: Immunity From Criminal Jurisdiction*, 27 Brit. Y. B. I. L. 186, 206 [1950].

In general, Great Britain, Canada, and Australia do not recognize implied immunities from their jurisdiction in favor of visiting friendly forces. British courts entertain criminal prosecutions against foreign service personnel even when the offenses occur aboard foreign armed vessels, *Chung Chi Cheung* v. *The King* [1939], A. C. 160, or in foreign military camps, *Rex* v. *Navratil*, Lauterpacht, *Ann. Dig. & Rep. Pub. Int. Law Cases*, 1919–1942 Supp., 161. Canada is of the same view. *Reference re Exemption of U. S. Forces from Canadian Criminal Law* [1943] 4 D. L. R. 11. Australia recognizes no exemption from civil jurisdiction and the same rule appears to extend to criminal jurisdiction. *Wright* v. *Cantrell*, 44 N. S. W. St. R. 45.

of the United States military or naval forces would be immune from criminal prosecution in British courts (unless the United States waived that immunity) (fn. 8, *supra*, p. 26). Senator Revercomb urged that the United States should grant reciprocal immunity to visiting forces. He asked that, at least as far as the federal courts were concerned, they should be divested of jurisdiction to the extent that the service courts had power to try them. 90 Cong. Rec. 6490–6498. The Congress was unwilling to grant or recognize any such immunity for visiting troops.

Japan, too, has expressly rejected any implied exemption of foreign forces from the jurisdiction of local tribunals. Prior to the conclusion of the Unified Command Agreement of June 11, 1954, T. I. A. S. 2995, a Japanese court tried two British sailors over protests by the British government (see N. Y. Times, Aug. 6, 1952, p. 1, col. 2); and the Japanese authorities granted a temporary immunity to United States forces only on condition that the NATO jurisdictional formula be substituted as soon as the latter became effective in Europe (see *infra*, p. 40).[9]

Under this view of international law, respondent is indubitably subject to the jurisdiction of Japan. He is and at all times since the alleged offense has been within Japanese territory. Except to the extent that Japan has consented otherwise, it has the exclusive right to define criminal offenses, to conduct trials, and

[9] As early as 1911, Japan tried and convicted a naval enlisted man who killed another enlisted man in a United States naval hospital ashore. II Hackworth, *Digest of International Law*, p. 422.

to impose punishment for the commission of offenses on its own soil.[10] Accordingly, respondent could have no claim whatever against the exercise of Japanese jurisdiction unless Japan has expressly or impliedly agreed not to exercise its jurisdiction.

There is plainly no question of implied immunity from Japanese jurisdiction for the respondent. The terms and conditions under which American forces remain in Japan have not been left to implication. They have been carefully worked out by treaty and implementing agreements which give the United States certain rights to exercise jurisdiction within Japan. Inherent to those rights was the agreement of the two sovereigns that the United States and Japan, respectively, in cases deemed important by the other, would give sympathetic consideration to a waiver of such rights—an agreement which in and of itself excludes any adoption of a rigid rule of non-waiver. In this case, that agreement has been implemented. Apart from the agreements (which are discussed in Point II, *infra*), petitioner has no implied or other exemption from Japanese criminal jurisdiction. If the treaty or agreements were non-existent or were deemed invalid, there would be no question but that the Japanese authorities could properly take respondent into custody and try him for the offense under Japanese law with which he has been charged. And

[10] The Japanese Peace Treaty explicitly recognizes full Japanese sovereignty "over Japan and its territorial waters" (App. A., *infra*, p. 5a). The preamble to the Treaty refers to the United States and Japan as "sovereign equals" (App. A, *infra*, p. 5a).

the courts of the United States would plainly have no authority to intervene. *Hirota* v. *MacArthur*, 338 U. S. 197; *Neely* v. *Henkel*, 180 U. S. 109, 123.[10a]

To appreciate the error of the District Court's treating the matter as one of domestic law one need only recognize that the jurisdiction of a United States court over a killing within the United States would be exclusive, under the Government's view of international law, unless covered by agreement; such jurisdiction could not possibly be defeated by the terms of the Japanese constitution or statutes. Certainly, a Japanese soldier who commits a crime on American soil and is about to be tried in our courts could not claim immunity from our jurisdiction by relying on Japanese law. For the purposes of United States territorial jurisdiction, the terms of the Japanese constitution and laws would be wholly irrelevant.

2. Where the Executive has thus taken a definite and formal position on a matter of international law, the courts should follow it if it is reasonably possible for them to do so. As this Court has so often declared and held, in the field of international affairs the judiciary should be slow to upset a view of the country's rights which, as here, both the executive and the legislative branches have adopted. "In such cases the judicial department of this government follows

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[10a] In *Neely* v. *Henkel*, the Court said (180 U. S. at 123):

"* * * When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States * * *."

the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." *United States* v. *Lee*, 106 U. S. 196, 209. The Court has insisted that American courts "should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35; *Ex parte Peru*, 318 U. S. 578, 588; see *National City Bank of New York* v. *Republic of China*, 348 U. S. 356, 361.

Accordingly, the courts accept as correct declarations and determinations with respect to foreign affairs and foreign policy, made by the Executive Branch by formal rulings or official action taken in conducting the foreign affairs or formulating the foreign policy of the nation. As the Court knows, this general principle of judicial abstention from the domain of foreign affairs has been consistently applied in various fields touching on this country's international relations. Even treaties from which private rights flow will normally not be interpreted contrary to a definite position taken by the Executive *vis-à-vis* a foreign country, especially where judicial intervention might well cause difficulties in the larger sphere of foreign relations. *E. g., Foster* v. *Neilson*, 2 Pet. 253, 307–309; *Williams* v. *Suffolk Insurance Co.*, 13 Pet. 415; *United States* v. *Reynes*, 9 How. 127, 153–155; *Charlton* v. *Kelly*, 229 U. S. 447, 468, 474–476; *Sullivan* v. *Kidd*, 254 U. S. 433, 442; *Factor* v. *Laubenheimer*, 290 U. S. 276, 295; cf. Jaffe, *Judicial Aspects of Foreign Relations* (1933), 71–78.

We know of no reason why the Court should depart from this principle when the issue involved is the

determination of the proper rule of international law binding this country as well as others. On the contrary, the rules of international law—governing the relationships of sovereign states—seem most appropriately subject to the principle that the courts should follow the political branches, if it is reasonably possible to do so. Since the position of the United States on the non-immunity under international law of visiting troops is plainly not unreasonable or unsupported, the Court can accept that position without deciding the matter for itself.[11]

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[11] None of the opinions in *Reid* v. *Covert*, No. 701, Oct. Term, 1955, and *Kinsella* v. *Krueger*, No. 713, Oct. Term, 1955, decided June 10, 1957, casts the slightest doubt on the plenary authority of the territorial sovereign over offenses committed on its soil. On the contrary, Mr. Justice Black's opinion expressly recognizes this plenary authority, apart from treaties and international agreements (slip op., pp. 13-14, fn. 29). The opinions of Mr. Justice Frankfurter and Mr. Justice Harlan also recognize, explicitly and implicitly, the dominant jurisdiction of the territorial sovereign.

The *Covert* and *Krueger* decisions are concerned solely with a situation where the *United States* seeks to try Americans abroad. The Court was not concerned with, and did not rule upon, the present situation where it is a foreign state which is seeking to try an American for conduct committed on its territory. For the latter situation, the intimations in all the opinions are, we believe, that nothing in the United States Constitution or laws prevents this country from fulfilling its obligations to a territorial sovereign like Japan.

B. Even the theorists relied on by respondent recognize that any immunity that visiting troops might possess is subject to limitation by international agreement and may always be waived by the government concerned

Certain writers have urged that under international law a state is obliged, when it agrees to friendly forces' entering its territory, to recognize that they are immune from local jurisdiction for some or all offenses. See, *e. g.*, King, *Jurisdiction over Friendly Foreign Armed Forces*, 36 Am. J. Int. Law 539; King, *Further Developments Concerning Jurisdiction Over Friendly Foreign Armed Forces*, 40. Am. J. Int. Law 257. On occasion during war, the United States has relied on this theory in an effort to obtain exclusive jurisdiction over members of its armed forces abroad. To many, this smacked of colonialism and an effort to revive the extraterritoriality of another century. Also, on further examination, this tentative view did not survive a canvass of prior international practice and of the basic theories of international law. For whatever reason, the fact is that no country was prepared to recognize an international obligation to grant extraterritorial rights to foreign soldiers. The United States itself, as pointed out above, has been unwilling to agree that foreign troops here shall be immune from the local courts. So far as is known, the theory of extraterritorial rights by international law is not now supported by any country.

But even this view held only by certain writers, which has been rejected by the United States and by the world, does not help respondent. For under this theory the immunity of visiting troops is always subject to definition and limitation by agreement between the two governments concerned, and is also subject to waiver by the government of the armed forces of which the soldier is a member. In this case, both events have taken place.

1. We discuss below the terms of the treaty and executive agreements under which United States troops are disposed in Japan. See Point II, *infra*, pp. 38–57. It is enough to point out here that even the most ardent advocates of immunity for visiting troops under international law recognize that the terms of that immunity and the limitations on it may be set by international agreement.[12] As we have already pointed out, in this case Japan has not remained silent. By agreement it has indicated the precise limits to the extraterritoriality which it is prepared to concede; and by the Security Treaty Japan and the United States have agreed that the conditions under which the troops are placed in Japan shall be governed by agreement. There is no room for an

[12] "It is, however, clearly permissible, and in many cases highly desirable, to have an express agreement on the subject rather than for the matter to be left to implication." "It may be concluded, however, that *in the absence of an agreement providing otherwise*, * * * the exemption of visiting forces from the jurisdiction of local courts * * * exists at all times and in all places * * *" [emphasis added]. King, *Jurisdiction over Friendly Foreign Armed Forces*, 36 Am. J. Int. Law 539, 549, 561.

implied extraterritoriality greater than that which has been made express. Even if there were an initial immunity under international law, it has been superseded by the specific agreements between Japan and the United States.

2. A final and conclusive answer to respondent's contentions based upon international law is that whatever immunity he might have is subject to waiver by his government. In the case of *Chung Chi Cheung* v. *The King* [1939], A. C. 160, 176, the Privy Council considered the immunity of a member of the crew of a foreign armed public ship, and held that it was subject to waiver by the defendant's government. It was there said:

> But if the principles which their Lordships have been discussing are accepted, the immunities which the local Courts recognize flow from a waiver by the local sovereign of his full territorial jurisdiction, and can themselves be waived. The strongest instances of such waiver are the not infrequent cases where a sovereign has, as it is said, submitted to the jurisdiction of a foreign Court over his rights of property. * * * But a sovereign may say, you have waived your jurisdiction in certain cases, but I prefer in this case that you should exercise it. The original jurisdiction in such a case flows afresh.

The same holding was made by the Mixed Court of Cassation in Egypt in the case of *Gouvaris* v. *Ministère Public* in 1943.[13] There, where an allegedly

[13] See Lauterpacht, *Ann. Dig. and Rep. of Public Int. Law Cases*, 1943–1945, p. 152.

on-duty offense was involved, the court held that any immunity could be waived expressly or impliedly by the soldier's commander—the immunity was not for the convenience of the particular individual.[14] This has been the official position of the United States. Both the *Manual for Courts-Martial* of 1949 (par. 11, p. 11) and the *Manual for Courts-Martial* of 1951 (par. 12, pp. 16–17), issued by the President, provide that the jurisdiction which the United States retains over members of its armed forces abroad—

> * * * may be waived by the visiting sovereign and is not a right of the individual concerned.

Thus, any immunity which respondent can claim applies to him not in his individual capacity but because of his connection with the Government of the United States. At best, he partakes of some small share of the sovereign immunity of the United States. His very contention that the offense arose in the performance of official duty and that thereby he has an immunity from local jurisdiction demonstrates that he is not asserting an individual and personal right but rather claiming the benefit of his connections with his government. But the immunity of any official of the government, and the sovereign immunity of the Government itself, is subject to waiver by the Government.

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[14] Prof. Charles Cheney Hyde writes: "Members of the force who there commit offenses are dealt with by the military or other authorities of the State to whose service they belong, *unless the offenders are voluntarily given up.*" 1 Hyde, *International Law* (2d rev. ed.), Sec. 247. [Emphasis added.]

No one can contend that international law confers a greater immunity on a visiting soldier than it does on a diplomat. In each case the immunity (if it exists) would bar the local courts from asserting jurisdiction over an official of a foreign government who is stationed there under orders from his sovereign. But it is clear that diplomatic immunity is to protect the sovereign's interests, and may be waived by the sovereign whenever it sees fit, without the consent of the individual. See *Davis* v. *Packard*, 7 Pet. 276, 284; *Börs* v. *Preston*, 111 U. S. 252; 256; *Ex parte Gruber*, 269 U. S. 302. The Comment to the Draft Convention on Diplomatic Privileges and Immunities (26 Am. J. Int. Law, Supp., 125, 128 (1932)) points out that a member of a mission may not challenge a waiver of his immunity made by his government. This has been made explicit in some recent international agreements. See, *e. g.*, Section 20 of Article V to the convention between the United Nations and the United States (Feb. 1946), and Article 22 of the Agreement relating to the Status of the North Atlantic Treaty Organization, T. I. A. S. 2992:

> "Privileges and immunities are granted to officials and experts in the interests of the Organisation and not for the personal benefit of the individuals themselves. The Chairman of the Council Deputies shall have the right and the duty to waive the immunity of any official or expert in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the Organisation."

Waivers of diplomatic immunity are not uncommon in international practice. 1 Lauterpacht, Oppenheim's *International Law* (8th ed), 800–813. The United States has waived the immunity of its diplomatic personnel in both civil cases, IV Hackworth, *Digest of International Law*, p. 546, and in criminal cases, *e. g.*, *A Report on the Case of Tyler Kent*, 11 Dept. of State Bull. 243. The *Kent* case is particularly applicable here. Kent was a member of the Foreign Service assigned to the American Embassy in London. While stationed there and within the embassy he allegedly stole documents to which he had access in the course of his duties and passed them to unauthorized persons. The United States Ambassador granted a British request that Kent's diplomatic immunity be waived. Kent was then tried and convicted in the London Central Criminal Court for the larcenies committed in the American Embassy and for violation of the British Official Secrets Act.[14a]

In short, it is indisputable that the immunities of a United States soldier in Japan are governed by the terms of the international agreement between the two countries; and any immunity from local jurisdiction which a soldier might have under international law or by agreement is for the benefit of the United States and is subject to waiver by the United States. What respondent asserts is that there is an international right to be a fugitive from Japanese justice in Japan for conduct committed there. There is no support for such a position.

[14a] This Court denied leave to file a petition for mandamus in his behalf after his conviction. *Ex parte Kent*, 323 U. S. 672.

II

BY INTERNATIONAL ARRANGEMENT, THE UNITED STATES HAS VALIDLY ACQUIRED A DISCRETIONARY RIGHT TO EXERCISE CRIMINAL JURISDICTION IN JAPAN IN CERTAIN CATEGORIES OF CASES, BUT IN NO CASE IS SUCH JURISDICTION MANDATORY AND THE UNITED STATES MAY ALWAYS DECLINE TO EXERCISE ITS JURISDICTION IN FAVOR OF THE JURISDICTION OF JAPAN

Three basic documents govern the terms under which the United States is allowed to deploy troops within Japan and to exercise criminal jurisdiction over them. These are (1) the Security Treaty, (2) the Administrative Agreement under Article III of the Security Treaty, and (3) the Protocol to Amend Article XVII of the Administrative Agreement. Under these agreements, Japan and the United States have concurrent jurisdiction to try members of the United States forces for conduct, as here, which constitutes an offense both under Japanese law and under the Uniform Code of Military Justice. Where the offense is one "arising out of any act or omission done in the performance of official duty", the United States is given the "primary" right to exercise jurisdiction. In the case of offenses not arising out of an act done in the performance of official duty, Japan retains the "primary" right to exercise jurisdiction (if non-Americans are involved). But if the state having the primary right "decides not to exercise jurisdiction" the other state may do so—that is, it may conduct a trial and, if the defendant is found to have committed the alleged offense, may impose punishment.

As we have shown in Point I, *supra*, if these inter-

national arrangements between Japan and the United States are invalid, Japan has exclusive jurisdiction over all offenses within its territory, and a United States court should not order officials to try to defeat it. See *Neely* v. *Henkel*, 180 U. S. 109. The question of the validity of the agreements under which the United States has chosen not to exercise jurisdiction over respondent may thus not be relevant. Nevertheless, as respondent argues otherwise and the Court may deem the matter pertinent, we discuss that issue. It is the Government's position that there is no doubt that (*a*) the international arrangement is fully valid and binding on the United States, and (*b*) the United States may validly decline to exercise jurisdiction in a particular case, even though United States jurisdiction in that case is "primary" under the international arrangement.

A. The contents of the international arrangement

1. *The Security Treaty.*—The Security Treaty with Japan (T. I. A. S. 2491) was signed and ratified concurrently with the Treaty of Peace with Japan (T. I. A. S. 2490). See Appendix A, *infra*, pp. 7a–11a. Under Article I, Japan granted to the United States and the United States accepted the right to dispose armed forces in and about Japan. Article III provided (Appendix A, *infra*, p. 11a):

> The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments.

The Security Treaty thus provides the basic framework but none of the terms relating to the exercise of criminal jurisdiction.

2. *The Administrative Agreement.*—The Security Treaty was signed on September 8, 1951. Before it was ratified, an Administrative Agreement under Article III of the Treaty *supra,* was signed on behalf of the United States on February 28, 1952. It came into force on April 28, 1952. (Appendix A, *infra,* pp. 13a–29a.)

Substantively, three provisions of the Administrative Agreement bear on this case. Under Article XVII, Paragraph 2, it was agreed that, "[p]ending the coming into force with respect to the United States of the North Atlantic Treaty Agreement" on status of forces, the United States military courts and authorities in Japan should have exclusive jurisdiction in Japan over all offenses by military personnel; but it was also provided that "[s]uch jurisdiction may in any case be waived by the United States." Under Paragraph 1 of Article XVII, the United States committed itself to conclude with Japan, at Japan's request, an agreement on criminal jurisdiction similar to the corresponding provisions of the NATO Status of Forces Treaty when that treaty came into effect. And under Article XXVI of the Administrative Agreement, there was established a Joint Committee as the means for consultation on all matters requiring mutual consultation regarding the implementation of the Agreement. That Article also provides that if the Joint Committee is unable to resolve any matter it shall refer it to the respec-

tive governments for further consideration through appropriate channels.

3. *Protocol.*—Following the coming into effect of the NATO Status of Forces Treaty, the United States concluded with Japan; at its request and in compliance with the obligation of the United States under the Administrative Agreement, a Protocol to Amend Article XVII of the Administrative Agreement so as to bring it in accord with the NATO Treaty. (Appendix A, *infra,* pp. 23a–28a.)

This Protocol provides the substantive agreement under which the United States is now allowed to exercise criminal jurisdiction over offenses in Japan—an agreement which is the same as that which this country now has with the countries which have agreed to the NATO Status of Forces Treaty. The agreement is that in regard to criminal jurisdiction over American military personnel in Japan (1) United States military authorities shall have *exclusive* jurisdiction over offenses which are punishable by American but not by Japanese law; (2) Japanese authorities shall have *exclusive* jurisdiction over offenses punishable by Japanese but not by American law; (3) where "the right to exercise jurisdiction is concurrent," American military authorities shall have *primary* jurisdiction in relation to offenses against the property or the security of the United States, the property or the person of other members of the American armed forces, its civilian component, and dependents, and offenses "arising out of any act or omission done in the performance of official duty"; the Japanese authorities shall have *primary* jurisdiction over all other

offenses. The Protocol further provides in Paragraph 3 (c) that (Appendix A, *infra*, p. 25a):

> If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

It was under this provision of Paragraph 3 (c)—which explicitly provides that "primary" jurisdiction may be waived—that the United States determined to waive any right to exercise its jurisdiction, and to accede to Japan's request that that state exercise its own jurisdiction. This determination was confirmed by the Secretaries of State and Defense and by the President. See the Statement, *supra*, pp. 7–8.

B. The international arrangement is valid and binding

1. *The jurisdictional agreements were authorized by the Security Treaty.*—As we have pointed out, Article III of the Security Treaty specifically authorizes administrative agreements between the two governments:

> The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments.

Respondent makes two arguments to show that this Article did not actually authorize the executive agreements governing criminal jurisdiction over United States troops in Japan. The *first* is that the Treaty only authorized agreements dealing with the "disposition" of troops—that is, dealing with the places in which troops were to be stationed—and did not authorize any agreement with respect to jurisdiction over troops. Such a strained and restricted construction of Article III is clearly erroneous. The basic right which the United States acquired under Article I of the Security treaty is "to dispose * * * forces in and about Japan." Article III provides that "The *conditions* which shall govern the disposition of armed forces * * *" shall be determined by agreements. Obviously, the agreements were to cover the *conditions* under which the troops were to be disposed, and were not limited to the places where they were to be located or to the number of troops to be stationed at a place. Any other construction would have meant that none of the inevitable problems, such as taxation, customs, use of power facilities, etc., let alone jurisdiction, could have been covered by agreement. Article III would have had only minimal coverage, and there would be large, unexplainable gaps in the provisions made by the two nations for the stationing of American troops in Japan.

Above all, of course, is the crucial fact that both nations, contemporaneously with the making of the Security Treaty, construed Article III in the sense we have indicated. Their representatives promptly

sat down and worked out the elaborate Administrative Agreement (T. I. A. S. 2492; excerpts in Appendix A, *infra*, pp. 13a–19a) covering all the conditions governing the armed forces disposed in Japan. This concordance between the two parties' spontaneous practical construction of the Treaty and our own Government's position has the greatest of weight. See, *e. g.*, *Factor* v. *Laubenheimer*, 290 U. S. 276, 295; *supra*, p. 30.

Respondent's *second* argument is that the United States Senate, in approving the Security Treaty, did not intend to authorize the executive to conclude an administrative agreement which would allow the waiver of court-martial jurisdiction over United States soldiers for offenses committed within Japan. An examination of the pertinent history proves otherwise.

The Senate, in approving the Security Treaty, understood that Article III authorized an executive agreement which would deal with criminal jurisdiction over military personnel. The 1952 Administrative Agreement (*supra*, pp. 40–41), already signed, was before the Senate during the debates on the ratification of the Treaty. 98 Cong. Rec. 2376–2381.[15] This agreement provided, as already noted, that upon the coming into force of the NATO Status of Forces Treaty the United States would at the option of Japan conclude with Japan an agreement on criminal juris-

[15] The signing of the Administrative Agreement had been specifically authorized by the President. See Hearings before the House Committee on Foreign Affairs on H. J. Res. 309, 84th Cong., 2d Sess., pt. 2, at p. 559.

diction similar to the corresponding provisions of the NATO agreement. In the meantime, the United States was to have exclusive jurisdiction over all offenses committed in Japan by members of the United States armed forces; but there was also the express provision that "[s]uch jurisdiction may in any case be waived by the United States." (Appendix A, *infra*, p. 18a.) The full text of the Administrative Agreement was printed in the body of the Congressional Record on March 17, 1952, and again on March 20, 1952 (98 Cong. Rec. 2376, 2555).

In the course of the debate, Senator Jenner introduced a reservation to the Security Treaty to the effect that, since Congress had the sole power to declare war and authorize employment of the armed forces, any administrative agreements under Article III of the Treaty were to be void insofar as the United States was concerned unless ratified by the Senate as a treaty or otherwise approved by the Congress. 98 Cong. Rec. 2596.[16] This reservation was rejected by a vote of 45–22. 98 Cong. Rec. 2604. And the question of criminal jurisdiction was the one problem taken up by Senator Sparkman, in support of the Security Treaty, as an example of what would b covered by an admin-

[16] This proposed reservation stemmed not from concern over "the legal status of military and civilian personnel at our bases" but from fear of executive exercise of the war-making power. 98 Cong. Rec. 2367.

istrative agreement, and as a reason to oppose the proposed reservation of Senator Jenner.[17]

Similarly, the Senate was fully cognizant when it approved the NATO Status of Forces Treaty that such approval entailed adoption of the same formula

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[17] [Senator Sparkman:] "I believe that one of the reservations which have been proposed by the able Senator from Indiana [Mr. Jenner] relates to an administrative agreement, not requiring action by Congress.

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"Mr. President, it is article III of the security treaty between the United States and Japan which makes reference to these administrative agreements, and I desire to read it:

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"Mr. President, I shall mention one problem that we know will be subject to change and will have to be worked out under an administrative agreement. I refer to a problem which the Presiding Officer, Mr. Smith of North Carolina, who has been president of the American Bar Association, will readily recognize as being a real one. It is the subject of extraterritoriality with reference to criminal offenses committed by our forces in Japan. Who shall try them? What law shall be applied?

"It is a difficult problem to solve anywhere, particularly as between the West and the East, because our respective backgrounds and traditions and legal principles differ so greatly.

"Finally, this agreement was reached, and I believe everyone will concede that it was a wise solution of the problem, namely, that for the time being American forces will retain jurisdiction over our men when they commit offenses, but when the agreement which we draw up with reference to our forces in the NATO countries is agreed to or comes into being that agreement shall be applied. I have not tried to give the exact wording, but in substance, that is the agreement. It takes into consideration that changes may take place and, indeed, are anticipated.

"I believe the Senate will recognize the wisdom of making it an administrative or executive agreement and not requiring its ratification by the Senate or its approval by the Congress as a whole." [98 Cong. Rec. 2371-2372.]

for Japan by administrative agreement. During the hearings before the Senate Foreign Relations Committee on the NATO Treaty it was noted on numerous occasions that the United States was under commitment, by virtue of Article XVII of the Agreement with Japan (*supra*, p. 40), to apply the NATO jurisdictional formula to Japan. See the statement by Senator Smith of New Jersey (Supplementary Hearing before the Senate Foreign Relations Committee on the Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty, 83rd Cong., 1st Sess., p. 64); colloquy between Senator Wiley, Chairman of the Committee, and Mr. Phleger, Legal Adviser to the Department of State (Hearings, p. 78); statement by Hon. Walter Bedell Smith, Under Secretary of State (Hearings, p. 5); and see also, Hearings, pp. 15, 24, and Supplementary Hearing, p. 83.

It is thus apparent that both the original Administrative Agreement of 1952 and the 1953 Protocol (extending the NATO formula to Japan) were authorized by the Security Treaty and the NATO Status of Forces Treaty. Of the constitutional validity of such executive agreements, authorized by a treaty, there can be no doubt.[18] American history is filled with instances of agreements entered into by the executive pursuant to authorization by the Senate (in a treaty) or by the Congress (through legislation), and the constitutional foundation for such authorized agree-

[18] The general validity of the international arrangement with Japan appears to have been upheld by the Court of Appeals for the District of Columbia Circuit, in 1956, in *Cozart* v. *Wilson*, 236 F. 2d 732, vacated as moot, 352 U. S. 884.

ments is well established. See the detailed discussion, in Appendix C, *infra*, pp. 52a–69a, especially pp. 63a. *ff*. of the powers of the executive to conclude international agreements short of treaties.

2. *The Administrative Agreement and the Protocol are also valid as exercises of the President's power in the field of foreign affairs and as commander-in-chief.*—The validity of the Administrative Agreement and the Protocol, under the Japanese Security and NATO Status of Forces Treaties, is so clear that it is unnecessary to seek other support for the international arrangement involved in this case. But we may point out that, even if the specific provisions of the two treaties are put to one side, there is historical basis for the agreements in the Presidential conduct of foreign affairs and in the President's role as commander-in-chief.

Appendix C, *infra*, pp. 52a–69a, collects materials on the plenary foreign relations power of the United States, on the President's position in the conduct of foreign affairs, and on the relationship between the treaty clause of the Constitution and executive agreements. That discussion makes clear the significant role of the President, and his authority to conclude agreements with foreign countries in certain fields. The field of criminal jurisdiction over American troops stationed or visiting in a friendly foreign country would seem to be such an area in which the

President can properly act.[19] Questions have been raised in the past as to the extent of the right of the President to send troops into certain foreign countries, although this has frequently been done; but certainly there can be no doubt that the President has a large measure of authority to order military personnel to visit a friendly state. In such a case, rather than leave jurisdictional questions open to future controversy, it would be appropriate for the President, particularly as commander-in-chief, to work out the division of criminal jurisdiction by agreement, if possible.

There are instances in which that has been done. In 1882, an executive agreement was made between the United States and Mexico providing for the reciprocal right to pursue savage Indians across the border. The agreement contained clauses dealing with criminal jurisdiction.[20] The Final Protocol at the close

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[19] President Lincoln appeared to regard the matter of jurisdiction over American troops abroad as appropriate for executive consideration. In the code of rules he issued in April 1863, to govern the conduct in the field of the armies of the United States, it was provided that "Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred." Sec. II, Art. 47, General Orders No. 100, War Dept., April 24, 1863. (This was the so-called Leiber Code).

[20] These clauses (*Foreign Relations of the United States*, 1882, p. 397) were as follows:

ARTICLE VI

The abuses which may be committed by the forces which cross into the territory of the other nation shall be punished by the government to which the forces belong, according to

of the Boxer Rebellion, by which the United States and other powers acquired exclusive jurisdiction over part of Peking, was an executive agreement.[21] In 1941, the United States by executive agreement with Denmark obtained permission to place United States troops in Greenland. Under the agreement, the United States acquired exclusive jurisdiction over certain defense areas in Greenland, and exclusive jurisdiction over personnel other than Danish citizens and native Greenlanders within those areas. This agreement contained a "waiver" provision not unlike that in the current arrangement with Japan:

> * * * it being understood, however, that the Government of the United States may turn over to the Danish authorities in Greenland for trial and punishment any person committing an offense within a defense area, if the Government of the United States shall decide not to exercise jurisdiction in such case.[22]

Also during 1941 and prior to the entry of the United States into World War II, executive agreements were concluded covering the disposition of

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the gravity of the offense and in conformity to its laws, as if the abuses had been committed in its own territory, the said government being further under obligation to withdraw the guilty parties from the frontier.

ARTICLE VII

In the case of offenses which may be committed by the inhabitants of the one country against the foreign forces which may be within its limits, the government of said country shall only be responsible to the government of the other for denial of justice in the punishment of the guilty.

[21] *Foreign Relations of the United States*, 1901, App. p. 312.

[22] Executive Agreement Series No. 204, April 9, 1941, Art. VI.

troops in Iceland[23] and on the Leased Bases. This latter agreement contained detailed provisions giving the United States "the absolute right in the first instance to assume and exercise jurisdiction with respect to" certain offenses. It went on to declare, in a "waiver" provision:

> If the United States shall elect not to assume and exercise such jurisdiction the United States Authorities shall * * * so inform the Government of the Territory and shall, if it shall be agreed between the Government of the Territory and the United States Authorities that the alleged offender should be brought to trial, surrender him to the appropriate authority in the Territory for that purpose.[24]

Jurisdictional arrangements over United States military personnel in foreign countries have thus been historically recognized as an appropriate subject for executive agreements. In fact, where the United States is receiving rights from a foreign country which it would not have in the absence of agreement, the need for a formal treaty seems small. The grants of discretionary jurisdiction to the United States could be made by unilateral declaration by the host government. This demonstrates a key difference between the jurisdictional arrangements in Japan, made by executive agreement, and those with the NATO countries, made by treaty. With respect to the NATO countries, the obligations are reciprocal. NATO troops within the United States are governed

[23] Executive Agreement Series No. 232, July 1, 1941.

[24] Executive Agreement Series, No. 235, March 27, 1941, Art. IV.

by the NATO Status of Forces Treaty. Under this treaty the United States did not merely acquire rights to exercise jurisdiction overseas, but gave to other countries the right to exercise criminal jurisdiction in the United States. The jurisdiction of federal and state courts was diminished.[24a]

C. The exercise of jurisdiction by the United States is always discretionary and never mandatory, and where the United States chooses not to exercise its jurisdiction it must, under the international arrangement, allow Japan to proceed

It is clear that the right which the United States has under the Security Treaty, the Administrative Agreement, and the Protocol to exercise criminal jurisdiction within Japan over United States military personnel is neither exclusive nor mandatory. The Protocol specifically provides that both countries have

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[24a] Indeed, that the decision not to exercise jurisdiction over military forces is a proper subject for executive direction is an implicit holding of the *Schooner Exchange* case itself. The Court there held that the United States Attorney could properly indicate to the court the status of the ship, and pointed out that "without doubt, the sovereign of the place is capable of destroying" the implied immunity. If respondent were correct that it would be unconstitutional not to exercise jurisdiction over him which the United States could exercise, it would follow that the United States would have been required to exercise jurisdiction over the *Exchange* at the request of McFaddon and the others. If the United States can thus waive jurisdiction impliedly, it can do so by waiving it expressly. And if the United States through executive discretion can waive the jurisdiction of an American court in the United States, it is surely not constitutionally bound to assert such jurisdiction abroad.

jurisdiction over United States personnel in Japan (Appendix, *infra*, pp. 23a–24a):

> (a) the military authorities of the United States shall have the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States;
>
> (b) the authorities of Japan shall have jurisdiction over the members of the United States armed forces, the civilian component, and their dependents, with respect to offenses committed within the territory of Japan and punishable by the law of Japan.

The only occasion on which either government has exclusive jurisdiction is with respect to offenses which are punishable solely by its law. The United States, for example, would have exclusive jurisdiction over the offense of sleeping on duty, which presumably would not violate any Japanese law.

Where jurisdiction is concurrent, as it is in every case where the conduct may be in violation of the law of the United States and of Japan, the arrangement provides which country shall have the primary right to exercise jurisdiction. Under Paragraph 3 (a) (Appendix, *infra*, pp. 24a–25a), the military authorities of the United States have the primary right to exercise jurisdiction over members of the United States armed forces in relation to—

> (ii) offenses arising out of any act or omission done in the performance of official duty.

Thus, assuming that respondent's act of shooting Mrs. Naka Sakai was done in the perform-

ance of official duty, the military authorities of the United States had the primary right to exercise jurisdiction over him. But, as we have emphasized, this primary right is not mandatory or absolute. It is only primary, and its exercise is discretionary. Paragraph 3 (c) specifically provides that the state having primary jurisdiction may decide not to exercise its right, and if it makes that determination to notify the other state as soon as practicable. See *supra*, pp. 41–2, and Appendix A, *infra*, p. 25a.

Under Paragraph 3 (c), it is not only provided that the United State may choose not to exercise its primary jurisdiction but also the United States is obligated to give sympathetic consideration to a request from Japan to waive jurisdiction. The United States could not in good faith enter into such an arrangement unless it was in a position to waive jurisdiction in a case which it thought appropriate. The agreement to give sympathetic consideration to a request requires the ability to grant that request. To hold that the United States *must* exercise jurisdiction in all those instances in which it possesses primary jurisdiction would be to nullify the waiver provisions of Paragraph 3 (c), for they apply only in those cases where a state *does* have primary jurisdiction. It is under this paragraph that the Japanese authorities have waived their primary jurisdiction in 97% of the cases in which Japan has had such primary jurisdiction, and that foreign governments operating under like provisions have waived their primary

jurisdiction in about 73% of all the cases.[25] If Paragraph 3 (c) is excised from the international agreement as invalid or inoperative, no such reciprocity is likely to continue. And the willingness of foreign countries to receive American troops would undoubtedly be diminished—at the very least. The "waiver" provisions are an integral and significant part of the international arrangements providing for jurisdiction over American servicemen stationed abroad. The terms with Japan are identical to those which have been approved by treaty for all NATO countries.

It should be noted, finally, that Paragraph 3 (c), quoted above at p. 42, contains two sentences which provide different ways in which the United States may decline to exercise its primary jurisdiction. First, the United States may simply decide not to exercise jurisdiction, leaving the way open for Japan to exercise its concurrent jurisdiction if it wishes to do so. The second method, different in form if not in substance, is a "waiver" of jurisdiction. Here, the affirmative act of waiving jurisdiction is taken in response to a request by the other government. Although a unilateral decision not to exercise jurisdic-

[25] According to the records maintained by the Department of Defense, during the three-year period ending November 30, 1956, over 32,000 cases involving personnel of the Department of Defense arose which were subject to the primary jurisdiction of foreign courts. As stated in the text, through the application of waiver provisions such as Paragraph 3 (c) foreign governments waived their jurisdiction in about 73% of all the cases. During the year ending November 30, 1956, the Japanese Government waived its primary jurisdiction in over 5400 cases involving American military personnel—an average of over 100 a week.

tion is also frequently referred to as a "waiver" of jurisdiction, a waiver in response to the request of the other state embodies the significant element that the other nation is directly and immediately interested—is, in fact, an active participant and not merely a bystander. Its direct interest demonstrates that the transaction is truly one between two sovereign countries and is not merely the unilateral act of American officials.

We conclude that the Security Treaty and the two executive agreements negotiated under it are valid, and that they give the United States a discretionary right to exercise jurisdiction over respondent if the offense arose from an act done in the performance of official duty, but that they do not compel the exercise of American jurisdiction. The United States, in a decision approved by its highest executive officers, has decided not to exercise this jurisdiction. Under the agreements, Japan explicitly retained the right, under these circumstances, to exercise its sovereign jurisdiction over offenses against Japanese law committed within its territory. Accordingly, respondent has no rights under the international arrangement which he can assert in this forum.

The only remaining argument which respondent would appear to assert is that, though the treaty arrangements may be valid, under the Constitution the decision whether to exercise United States jurisdiction cannot be left to executive discretion, but must be de-

cided by Congress or the courts. We turn to this issue.[26]

III

UNDER THE CONSTITUTION, THE EXECUTIVE MAY PROPERLY BE ALLOWED DISCRETION TO PROSECUTE RESPONDENT WITHIN THE FEDERAL JURISDICTION OR TO MAKE HIM AVAILABLE FOR PROSECUTION BY JAPAN

A. The courts have recognized that decisions as to which jurisdiction is to try a defendant may be left to executive discretion

1. As we have argued above, in the absence of an agreement or treaty containing contrary provision, Japan could try respondent for an offense against Japanese law committed on Japanese soil. Japan, of course, could enter an agreement with the United States (or other sovereign nation) to refrain from exercising jurisdiction over the latter's nationals in specified cases. See *supra*, pp. 22 *et seq.* The question remains whether such an inter-governmental agreement is any the less valid because it incorporates an element of flexibility, or, otherwise stated, because there is an area in which there is provision for the exercise of executive discretion. More specifically, is there, from the standpoint of American

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[26] Respondent explicitly disavowed, in the District Court, any contention that his trial by Japan would be unfair or unjust. Accordingly, we do not stop to point out the procedural safeguards in the Japanese trials of American servicemen, or detail the experience which proves that no unfairness is to be anticipated. See *Reid* v. *Covert*, No. 701, Oct. Term, 1955, decided June 10, 1957, slip op., p. 13–14, fn. 29 (opinion of Mr. Justice Black); Note, *Criminal Jurisdiction over American Armed Forces Abroad*, 70 Harv. L. Rev. 1043 (April 1957).

law, a legal or constitutional objection to Paragraph 3 (c), which provides for a waiver or declination of jurisdiction by the United States authorities?

Since the United States is, itself, a nation of multiple sovereignties, it is hardly surprising that American decisional law provides a ready answer. In the conduct of relations between the United States and one of the constituent states, or between the states, it has long been settled that there is power and discretion on the part of the appropriate governmental officials to practice that comity upon which the harmonious operation of a federal government so largely depends. The Attorney General of the United States is thus authorized, even without specific statute, to waive the right of the federal government to the continued and exclusive custody of one who has been charged with (or convicted of) a violation of federal law and to make him available to state authorities so that he may answer a charge of violation of state law. *Ponzi* v. *Fessenden*, 258 U. S. 254. The same is no less true where a state has obtained initial custody and the request that the prisoner be made available for prosecution emanates from the United States[27] or from another state.[28]

In the *Ponzi* case, the petitioner had pleaded guilty to a federal offense and was serving a five-year sentence. He was thus in the exclusive custody of the

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[27] *Zerbst* v. *McPike*, 97 F. 2d 253 (C. A. 5); *Gunton* v. *Squier*, 185 F. 2d 470 (C. A. 9); *Lunsford* v. *Hudspeth*, 126 F. 2d 653 (C. A. 10).

[28] *Roberts* v. *Reilly*, 116 U. S. 80; *People* v. *Klinger*, 319 Ill. 275, 149 N. E. 799; *State* v. *Saunders*, 288 Mo. 640, 232 S. W. 973; 42 A. L. R. 585, Annotation, and cases there cited.

United States, which had an undoubted right to retain him until the completion of his term. 258 U. S. at 260–261. The question was whether, in these circumstances, the Attorney General could consent to Massachusetts' request (made in the form of a writ of *habeas corpus ad prosequendum*[28] addressed to the federal agent charged with custody of the prisoner) that Ponzi be made available, from day to day, for trial in the state courts upon an indictment there pending. Recognizing that the Attorney General had no express authority for making the federal prisoner available to Massachusetts (p. 261), this Court nonetheless concluded that such action was within the Attorney General's broad powers as chief law officer of the United States (pp. 262–264). Describing the situation as one requiring "a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure" (p. 259), the Court, in a unanimous opinion by Chief Justice Taft, held (p. 260):

> One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive

[28] The writ is a venerable one which issues "when it is necessary to remove a prisoner, in order to prosecute * * * in the proper jurisdiction wherein the fact was committed." 3 Blackstone, *Commentaries* 130.

custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. *In re Andrews*, 236 Fed. 300; *United States* v. *Marrin*, 227 Fed. 314. Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it.

A similar challenge to executive authority had been earlier made in *Roberts* v. *Reilly*, 116 U. S. 80. Roberts was under indictment in New York and the Governor of that State made due demand upon the Governor of Georgia that he be apprehended in Georgia and delivered to New York's authorities as a fugitive from justice. See U. S. Constitution, Art. IV, Sec. 2, clause 2. Following his arrest in Georgia, Roberts applied for a writ of *habeas corpus* in the District Court for the Southern District of Georgia, alleging that the acts with which he was charged by New York showed that he had committed a crime in the State of Georgia, as well as in the State of New York, and that the Governor of Georgia was bound to hold him to answer to the laws of Georgia before permitting him to be sent away for trial in another jurisdiction. If it be true, this Court observed, that the offense was initiated in Georgia and violated its laws, "it is none the less true that the offence charged is also a crime in New York against its laws; and the State of Georgia may choose to waive the exercise of

its jurisdiction by surrendering the fugitive to answer to the laws of New York" (pp. 96–97).[30]

There is similar executive discretion when a foreign government seeks extradition pursuant to treaty or agreement. John Bassett Moore has pointed out that "[i]t is, of course, within the discretion of the government upon which the demand is made to deliver up the prisoner, notwithstanding that a criminal prosecution is pending against him for a violation of its own laws" (1 Moore, *Extradition*, Sec. 369).[31] The inter-

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[30] Since custody is not "a place of sanctuary" (*Rigor* v. *State*, 101 Md. 465, 471–472, quoted with approval in *Ponzi*, 258 U. S. at 264), it has been frequently observed that waiver of custody is the sovereign's privilege and that its exercise is not subject to challenge by the individual. See the excerpt from *Ponzi* quoted in the text, *supra*. See, also, *Mitchell* v. *Boen*, 194 F. 2d 405, 407 (C. A. 10) ("The sovereign alone may raise objections to the interference with its rights to the possession of a prisoner, under the rule of comity."); *People* v. *Klinger*, 319 Ill. 275, 278, 149 N. E. 799, 801. ("The right of the Governor of the asylum state to decline to honor a demand for extradition is a right of the state, and is in nowise based on the personal right of the fugitive, and, where no objection is made by the court or authorities who have jurisdiction over the fugitive, he has no right to object to the exercise of jurisdiction over him by the court of another state".) Similarly, the immunity of a soldier within the United States from state prosecution is a matter to be asserted not by the individual but by the military authorities, who may waive the immunity without regard to the desires of the defendant. *Harris* v. *Hunter*, 170 F. 2d 552 (C. A. 10); *Kennedy* v. *Sanford*, 466 F. 2d 568 (C. A. 5), certiorari denied, 333 U. S. 864. See also, as to waiver of diplomatic immunity, *supra*, pp. 36–37.

[31] As we noted in our petition (p. 26 and p. 26, note 7), various extradition treaties to which the United States is party provide in terms that the executive of the asylum state shall determine, in its discretion, whether to surrender the accused. Such provisions, this Court observed in *Valentine* v. *United*

national practice is strikingly exemplified by the case of one Vernon Locke who was implicated in the notorious seizure of the vessel *Chesapeake* in 1863 and wanted by the United States to answer charges of murder and piracy. When demand for Locke was made upon the British Government, it appeared that he had already been committed for trial in the Bahamas on charges of forgery and conspiracy committed in that country. In reply to the American demand, Earl Russell advised (Dip. Cor., 1865, part 1, p. 385, quoted in Moore, *op. cit.*, Sec. 369):

> I have the honor to inform you of the decision which, after attentive consideration of all the circumstances of the case, her Majesty's gov-

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States ex rel. Neidecker, 299 U. S. 5, 12, are "familiar." For seventy years, the United States has had in effect with Japan an extradition treaty under which the turning over of citizens was discretionary on each side. Article VII, Treaty of April 29, 1886, TS 191, 24 Stat. 1015. Similar clauses appear in the treaty with Argentina of September 26, 1896, TS 6, 31 Stat. 1883, the treaty with Uruguay of March 11, 1905, TS 501, 35 Stat. 20028, and the former treaty with the Orange Free State of October 28, 1896, TS 266, 31 Stat. 1813. The following treaties specifically confer discretion upon the executive authority: treaty with Guatemala of February 27, 1903, TS 425, 33 Stat. 2147; treaty with Mexico of February 22, 1899, TS 242, 31 Stat. 1818; treaty with Nicaragua of March 1, 1905, TS 462, 35 Stat. 1869, in an article reading:

> Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so.

For the background of the Mexican treaty and an account of President McKinley's exercise of his discretion, in the case of Mattie Rich, see Rafuse, *The Extradition of Nationals* (1939), University of Illinois, pp. 44–46.

State Department files establish that this discretion has been regularly exercised, usually in favor of extradition.

ernment have come to in regard to this matter. It appears to her Majesty's government that the United States government are not entitled to obtain the extradition of Locke, until he shall have been tried for the offences alleged to have been committed by him against British law, and, if convicted, shall have undergone any sentence which may be passed upon him. But her Majesty's government are unwilling that, in consequence of any delay on this account in the extradition of Vernon Locke, the means of supporting the graver charge against him should be weakened, and I have, therefore, to state to you that her Majesty's government will waive their right to prosecute Locke for the offence of conspiracy and forgery, if the evidence upon the charge arising out of the seizure of the "Chesapeake" shall prove to be sufficient to justify extradition by the government of the Bahamas.[32]

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[32] The executive always makes the ultimate decision as to whether an individual shall be surrendered under a treaty of extradition. This is so even though the accused has been duly committed by a magistrate and the order of commitment has been sustained on *habeas corpus*. *In re Stupp*, 12 Blatch. 501, 516–517 (C. Ct., N. Y.); *Collier* v. *Vaccaro*, 51 F. 2d 17, 20 (C. A. 4); *In re Ezeta*, 62 Fed. 964, 996 (N. D. Cal.); 2 Hyde, *International Law* (2d rev. ed.) Sec. 340. As Judge Parker noted in the *Vaccaro* case, the executive may consider numerous factors which it is not for the courts to take into account in making the limited examination available on *habeas corpus* (51 F. 2d at 21). Note that the provisions governing extradition procedure require that the full record of the commitment hearing be certified to the Secretary of State. 62 Stat. 822, 18 U. S. C. 3184.

Valentine v. *United States ex rel. Neidecker*, 299 U. S. 5, is entirely consistent. In that case, this Court concluded that the extradition treaty between the United States and France did not cover citizens of the asylum state and that accordingly there was

An even stronger view as to executive authority over extradition was taken by John Marshall as a member of Congress in 1800.[33]

In the instant case, the respondent is on Japanese soil, where the alleged offense took place. The Japanese Government has asserted jurisdiction. The executive decision to respect that assertion and to waive any American claim to jurisdiction over respondent has been made in the exercise of a discretionary power which is explicitly written into the international agreement. Under established principles, there is not the slightest warrant for an assertion that respondent has a legal immunity under American law which insulates him from the necessity of answering the Japanese charge that he is criminally responsible for the death of a Japanese woman caused in Japan. See also Point IV, *infra*, pp. 71–78. The executive action taken is within executive prerogatives under the United

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no authority by which the United States could turn over to France an American citizen physically present in this country. If the treaty had covered citizens of the asylum state (as did the agreements between the United States and various other countries, 299 U. S. at 7), the ultimate decision whether to honor or decline the French demand would have rested with the Chief Executive. Hyde, *op. cit.*, Sec. 340.

[33] Marshall not only pointed out that the President could stop a national prosecution in order to make a person available for extradition, but stated (Annals of Congress, 6th Congress, col. 615):

> It is then demonstrated that, according to the principles of the American Government, the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question the power to decide which rests alone with the Executive department.

States Constitution and in strict accord with binding international agreements. When American soldiers enter a foreign country with the permission of the foreign sovereign, the situation is necessarily a delicate one—one calling peculiarly for that "reciprocal comity" to which this Court adverted in *Ponzi* v. *Fessenden*.[34] The agreement betwen the two countries recognizes and reflects this vital need. The President is, and must be, free to give it effect.

2. As we have just shown, it is not necessary that there exist specific Congressional legislation authorizing the remission of a defendant for prosecution by another jurisdiction; the international arrangement, taken together with the President's powers in the field of foreign affairs and as commander-in-chief, are sufficient. But the fact is that Congress has specifically authorized the trial of military personnel by local civil authorities. Article 74 of the old Articles of War made it mandatory on Army commanding officers to turn soldiers over to local civil authorities within the United States (41 Stat. 803):

> ART. 74. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial

[34] We emphasize again that, whatever immunity an individual may have (under international law or international agreement) from trial by the state with territorial jurisdiction, that immunity is for the benefit of his own state and may be waived by that state without his consent or over his objection. See *supra*, pp. 34–37, 61–63. This settled rule underscores the argument we have been making in the text, *i. e.*, that discretion may validly be lodged in the executive to decide whether an accused should be remitted for trial by the territorial jurisdiction.

or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense *committed within the geographical limits of the States of the Union and the District of Columbia,* and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. * * * [Emphasis added.]

In adopting the Uniform Code of Military Justice, the geographical limitation was eliminated, and it was made discretionary rather than mandatory to turn a soldier over to local civil authorities:

ART. 14. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES

(a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

* * * * *

[10 U. S. C. (Supp. IV) 814, 70A Stat. 41]

Reading Article 14 in conjunction with Article 5, which provides, "This chapter applies in all places," there can be no doubt that Congress, by legislation, has granted adequate authority to deliver soldiers for trial by civil authority at home or abroad.

B. The executive determination to forego the exercise of jurisdiction over respondent is not judicially reviewable

The decision whether, under Paragraph 3 (c) of the Protocol, the United States is to exercise its primary jurisdiction is obviously one for the Executive Branch in the conduct of military and foreign affairs. There are no judicial standards by which this decision can be tested. The problems of foreign relations provide both the context of, and the touchstone for, the exercise or nonexercise of the waiver provisions. It necessarily follows that a decision not to exercise—or to waive—jurisdiction is plainly not a matter for judicial review.

In the related field of extradition, this Court said in *Terlinden* v. *Ames*, 184 U. S. 270, 289, 290:

> The power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. *Holmes* v. *Jennison*, 14 Pet. 540, 569. Its exercise pertains to public policy and governmental administration, is devolved on the Executive authority, and the warrant to surrender is issued by the Secretary of State as the representative of the President in foreign affairs.
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> * * * * *
>
> The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision * * *.

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In general, the courts have, since the earliest days of the Republic, recognized the conduct of foreign relations as falling within the exclusive power of the political branches of the Government, particularly the Executive. *E. g., Foster* v. *Neilson,* 2 Pet. 253; *Williams* v. *Suffolk Insurance Co.,* 13 Pet. 415; *The Chinese Exclusion Case,* 130 U. S. 581; *Jones* v. *United States,* 137 U. S. 202; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304. See also *supra,* pp. 30–31. A classic enunciation of judicial abstinence in this field is set forth in *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.,* 333 U. S. 103, 111:

> * * * the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

It would be difficult to find a case to which this admonition is more applicable. Untold and immeasurable damage to the foreign relations of the United States will inevitably result if its hands are to be tied by the type of judicial intervention which

the respondent seeks. This Court, it is submitted, should reject that responsibility. It has always insisted that American courts "should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35; *Ex parte Peru*, 318 U. S. 578, 588; see *United States* v. *Lee*, 106 U. S. 196, 209.

C. There has been no abuse of discretion

Even assuming that the executive decision not to exercise primary jurisdiction over respondent—to "waive" jurisdiction—may be subject to judicial review on the merits, the scrutiny should be limited by the accepted standard which recognizes that in the international field the President must be accorded a degree of discretion and freedom from restriction "which would not be admissible were domestic affairs alone involved." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320.

In any event, it is clear that there was no abuse of discretion. There was a prolonged dispute between Japan and the United States as to which had primary jurisdiction. See the Statement, *supra*, pp. 3–9. Japan's contention that the killing did not arise from an act done in the performance of official duty was not unreasonable.[35] Its position was apparently supported by the United States Army Circular (Appendix A, *infra*, p. 37a) which provided that, for the purposes of the agreements with Japan, "official duty"—

[35] In this connection, see the facts with respect to the claims of each side set forth in the "Affidavit With Respect to Facts," dated June 8, 1957, by General Counsel Dechert of the Department of Defense.

> * * * is meant to apply only to acts which are *required* to be done as a function of those duties which the individuals are performing. [Emphasis added.]

There was the further question of whether a Japanese court did not have the right to make a judicial determination of the question of whether the act done was in the performance of official duty. The Agreed Official Minutes to the Protocol (Appendix A, *infra*, p. 29a) provided that the certificate of a commanding officer—

> * * * shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

This language may be said to refer to a determination of performance-of-duty status by a Japanese judicial proceeding.* This has never yet been done, and there may be advantages to the United States in not establishing such a practice.

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* See the reference to the Japanese Code (Appendix A, *infra*, p. 29a). The language itself is derived from the British Visiting Forces Act of 1952, which was amended in passage so that the certificate of a visiting commanding officer that an offense arose from an act done in the performance of official duty would not be conclusive on the British courts. See, *e. g.*, 178 Parliamentary Debates (Hansard) (Lords), 5th Series, page 1076:

> Now, the man is brought before a court in the United Kingdom, and that court can say "No, it is not conclusive: we will show that the certificate is wrong." That is the only result of the Amendment.

See also Hearing before a Senate Subcommittee on Armed Services, Operation of Article VII NATO Status of Forces Treaty, 85th Cong., 1st Sess., p. 17: "In England, however, by the statute * * * the determination of the commander is given only prima facie weight and the final determination rests with the court."

Further, Japan has waived its primary jurisdiction in over 97 percent of the cases involving members of the United States military forces where primary jurisdiction was in Japan. See *supra*, pp. 54–55. This is the first case in which the United States has made a decision not to exercise primary jurisdiction where, by present hypothesis, it had it. It may well be that the United States concluded that to waive jurisdiction in this case was essential if the United States was to continue to ask and receive waivers in the vast number of cases where Japan had primary jurisdiction. Moreover, the position of the United States *vis-à-vis* the other nations with comparable jurisdictional agreements had to be taken into account. As noted above (*supra*, p. 55), over a recent three-year period these countries waived their primary jurisdiction in over 73% of the cases.

The very recitation of these considerations, together with the sharply disputed facts as to the circumstances of the killing (see the Statement, *supra*, and App. B, *infra*, pp. 39a–40a, 42a–43a), demonstrate not only that the decision of the Executive was reasonable, but that the decision itself is one for the Executive to make, rather than a court.

IV

A FEDERAL OFFICER HAS NO PERSONAL CONSTITUTIONAL RIGHT TO TRIAL BY THE UNITED STATES RATHER THAN BY ANOTHER JURISDICTION, AND RESPONDENT HAS NO SUCH STATUTORY RIGHT

Invoking principles of American federalism rather than those of international law, the District Court as-

sumed that a federal officer charged with a state crime committed in the performance of official duty has a personal constitutional right to trial exclusively in the federal courts. The court therefore held that "Applying the same constitutional protection to the [respondent] against his delivery to a foreign State that would be applied to his delivery for prosecution in a state court, * * * the threatened action by the [petitioners] is illegal and in violation of the Constitution and laws of the United States" (Appendix B, *infra*, pp. 49a–50a).

We shall show, however, that there is in fact no such constitutional right to trial in the federal courts and that the cases upon which the court below principally relied have reference to a statutory remedy which in that instance vindicates no personal right of the accused but rather the supremacy of federal law under Article VI of the Constitution. And, of course, the concept of supremacy of federal law is entirely inapposite to this case, where the jurisdictional interests of two co-equal sovereigns are in question. In misapplying the principles governing remissions of a federal officer for state trial, the District Court totally disregards both the international character of the present case, and the existence and explicit terms of Paragraph 3 (c), the "waiver" provision. (Nor did the court below specify what assumed constitutional rights of the petitioner would be violated.) Japan is not like a state of the American union, subordinate to the Federal Government and its courts. Japan is an independent sovereign power with full jurisdiction under international law to try all offenses

against its laws committed on its territory; and in its international arrangement with this country it has preserved that jurisdiction.

A. The heart of the District Court's ruling lies in its reliance on *In re Neagle*, 135 U. S. 1. The court wrote (Appendix B, *infra*, p. 48a):

> Since the petitioner's act was committed in the performance of official duty, under the principles announced by the Supreme Court in the case of *In Re Neagle*, 135 U. S. 1, the petitioner is accountable only to United States Federal jurisdiction for any act or omission. * * *.

But *In re Neagle* does not support respondent at all.

The case was an appeal from an order discharging Neagle, a deputy United States marshal, from the custody of a California sheriff. Neagle, who had been assigned to guard Justice Field, in the performance of his official duties killed Field's assailant, David S. Terry. Charged with murder by the state of California, Neagle sought and was granted discharge on a writ of habeas corpus. The Court held that the discharge was proper under then Section 753 of the Revised Statutes,[37] which provided that "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is * * * in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; * * *." In holding that that *statute* author-

[37] See 28 U. S. C. 2241 (c).

ized the proceeding (135 U. S. at 70), the Court emphasized the necessity for the supremacy of federal law in our governmental system. But both the statute and the concept which it reflects—that of the supremacy of federal law within the United States—are, of course, wholly absent in this case. Here, we have an international, rather than a federal, context; and we have the explicit "waiver" provisions of Paragraph 3 (c).

Indeed, where the writ is granted in the federal-state cases, as in *Neagle*, the federal court often proceeds on the assumption that, because federal law is supreme, there would be no violation of state law if the act is performed pursuant to a federal duty. See Strayhorn, *The Immunity of Federal Officers from State Prosecutions*, 6 North Carolina Law Review 123, 127. For example, in *In re Fair*, 100 Fed. 149, relied upon by the court below (Appendix B, *infra*, p. 48a), the question presented was whether the state court had jurisdiction to try petitioner for the slaying of a deserter who was fleeing from military custody, where the petitioner was following orders received from his Army superior. In answering this question in the negative, the court wrote (p. 151):

> * * * an act done by an officer or agent of the United States in and about a matter solely within federal control, and in pursuance of an authority given by the laws of the United States, is not an offense against the laws of the state (Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55).

This reasoning is clearly inapplicable where the alleged crime takes place on the territory of an entirely independent sovereign. In such a case, the act, regardless of its characterization by American law, is violative of the laws of the foreign sovereign. See *supra*, p. 23 *et seq.*

Moreover, the power of the federal court to issue a writ of *habeas corpus* where release from state custody is sought by a federal officer cannot be said to be founded on any personal constitutional right of the accused not to be tried by the state, for issuance of such a writ is entirely discretionary with the court.[38] Thus, this Court said in *Drury* v. *Lewis*, 200 U. S. 1, 8, where release from state custody was denied a soldier held for a homicide which he claimed was committed in performance of a federal duty:

> We have repeatedly held that the acts of Congress in relation to *habeas corpus* do not imperatively require the Circuit Courts to wrest petitioners from the custody of state officers in advance of trial in the state courts, and that those courts may decline to discharge in the proper exercise of discretion * * *.

If there were any personal constitutional right of the accused to choose the forum in which he would be tried, grant of the writ would be mandatory and would not rest in the discretion of the court. But not only is the grant of the writ discretionary; in the absence

[38] Compare the rule that international immunities are for the benefit of the state, rather than the individual, and may be waived without the consent of the individual. *Supra*, pp. 34–37; and see *supra*, pp. 51 ff, on extradition and on remission of servicemen for trial by state courts.

of extraordinary circumstances, the petitioner is required to present his claim of a federal defense in the state courts. See Hart and Wechsler, *The Federal Courts and the Federal System*, 380.

Nor does *Johnson* v. *Maryland*, 254 U. S. 51, stand for the proposition that a federal officer has a personal right to a federal trial. There, Johnson was an employee of the United States Post Office and while driving a government motor truck in the transportation of mail was arrested in Maryland, tried in the courts of that state, and convicted for driving without a state license. The Court held that the conviction could not stand because the state could not constitutionally require a federal officer to desist from the performance of his duties until he had satisfied a state requirement in addition to those that the federal government had pronounced sufficient. This case plainly does not establish an immunity from state trial but merely the unconstitutionality of the particular state statute as applied to the federal officer. Not only was the trial in fact conducted in the state court but Justice Holmes observed: "It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets." 254 U. S. at 56. Thus, not only is there no personal constitutional immunity from trial in the state courts for acts arising out of the performance of federal duties but, indeed, under certain circum-

stances, there may even be ultimate liability to the state for these acts.

B. We believe it clear that in the federal-state cases the right to assert jurisdiction is one which rests in the first instance with the sovereign, and that in those instances the statutory remedy of *habeas corpus* protects no personal constitutional right. And it is likewise clear that no other statutory right is available to respondent. The statutory right to remove an action commenced in a state court to a federal court, conferred by 28 U. S. C. 1442a, does not aid him.[39] This statute, applicable only to removal of actions from a state court, does not confer any right beyond its specific terms to trial in a federal court. Again, the underlying principle embodied in the statute is that of the supremacy of federal law within the United States. Congress may provide for the removal of actions from state to federal courts because the states have ceded to the national government some of the attributes of sovereignty. *Tennessee* v. *Davis*, 100 U. S. 257. Japan has made no like cession of sovereignty.

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[39] 28 U. S. C. 1442a provides:

> A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is pending in the manner prescribed by law, and it shall thereupon be entered on the docket of the district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine the cause.

Furthermore, there is no Congressional legislation requiring that respondent be tried in an American forum, let alone a federal forum. On the contrary, as we have pointed out above (*supra*, p. 65–66), Article 14 of the Uniform Code of Military Justice specifically envisages that servicemen may be handed over to a "civil authority" for trial.

In summary, the authorities relied on by the court below to establish the proposition that respondent "is accountable only to United States Federal jurisdiction" deal with acts which took place within the territorial confines of the United States, were concerned solely with state-federal jurisdictional conflicts, and were resolved by reference to the principle of federal supremacy. They are all plainly inapplicable here.

CONCLUSION

We have shown that under international law, under the agreement with Japan, and under the United States Constitution, respondent has no personal immunity from prosecution by Japan for the killing of a Japanese national in Japanese territory. Whatever express or implied immunity there might be is for the benefit of the United States, may be waived by it, and has been waived. We have also demonstrated that the international arrangement with Japan under which the waiver took place is valid and binding on the United States, and that nothing in our Constitution or laws precludes the exercise of executive discretion to decline to exercise jurisdiction in respondent's case. This exercise of executive discretion is not reviewable by the courts, and

if it were it would have to be upheld in this case as reasonable.

But we should also point out, in closing, that even if the international arrangement were held to be invalid or inoperative Japan would have jurisdiction over respondent. In the absence of the agreement the United States could not assert exclusive jurisdiction. Valid or not, the agreement indicates that Japan retained concurrent jurisdiction over United States personnel and set the maximum limit on the immunity which it would grant, and for which it gave certain concessions. If the United States is not free to carry out its side of the bargain, Japan, it would seem, could properly assert the right as the territorial sovereign to try respondent.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed and the injunction vacated.

HERBERT BROWNELL, JR.,
Attorney General.

J. LEE RANKIN,
Solicitor General.

OSCAR H. DAVIS,
ROGER FISHER,
LEONARD B. SAND,
RALPH S. SPRITZER,
Assistants to the Solicitor General.

HOWARD E. SHAPIRO,
Attorney.

JULY 1, 1957.

APPENDIX A

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[Matter which might be considered particularly relevant has been printed in bold face type]

Treaties and Other International Acts Series 2490

TREATY OF PEACE WITH JAPAN

- Signed at San Francisco September 8, 1951
- Ratification advised by the Senate of the United States of America March 20, 1952, with a declaration
- Ratified by the President of the United States of America April 15, 1952, subject to declaration
- Ratification of the United States of America deposited at Washington April 28, 1952
- Proclaimed by the President of the United States of America April 28, 1952
- Entered into force April 28, 1952

TREATY OF PEACE WITH JAPAN

Whereas the Allied Powers and Japan are resolved that henceforth their relations shall be those of nations which, as sovereign equals, cooperate in friendly association to promote their common welfare and to maintain international peace and security, and are therefore desirous of concluding a Treaty of Peace which will settle questions still outstanding as a result of the existence of a state of war between them;

* * * * *

CHAPTER I

PEACE

ARTICLE 1

(a) The state of war between Japan and each of the Allied Powers is terminated as from the date on which the present Treaty comes into force between Japan and the Allied Power concerned as provided for in Article 23.

(b) The Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters.

CHAPTER II

TERRITORY

ARTICLE 2

(a) Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, includ-

ing the islands of Quelpart, Port Hamilton and Dagelet.

(b) Japan renounces all right, title and claim to Formosa and the Pescadores.

(c) Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.

(d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan.

(e) Japan renounces all claim to any right or title to or interest in connection with any of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise.

(f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.

ARTICLE 8

* * * * *

Treaties and Other International Acts Series 2491

SECURITY TREATY

Between the
UNITED STATES OF AMERICA
and JAPAN

- Signed at San Francisco September 8, 1951
- Ratification advised by the Senate of the United States of America March 20, 1952
- Ratified by the President of the United States of America April 15, 1952
- Ratified by Japan November 19, 1951
- Ratifications exchanged at Washington April 28, 1952
- Proclaimed by the President of the United States of America April 28, 1952
- Entered into force April 28, 1952

SECURITY TREATY

BETWEEN

THE UNITED STATES OF AMERICA AND JAPAN

Japan has this day signed a Treaty of Peace with the Allied Powers.[1] On the coming into force of that Treaty, Japan will not have the effective means to exercise its inherent right of self-defense because it has been disarmed.

There is danger to Japan in this situation because irresponsible militarism has not yet been driven from the world. Therefore Japan desires a Security Treaty with the United States of America to come into force simultaneously with the Treaty of Peace between the United States of America and Japan.

The Treaty of Peace recognizes that Japan as a sovereign nation has the right to enter into collective security arrangements, and further, the Charter of the United Nations recognizes that all nations possess an inherent right of individual and collective self-defense.

In exercise of these rights, Japan desires, as a provisional arrangement for its defense, that the United States of America should maintain armed forces of its own in and about Japan so as to deter armed attack upon Japan.

The United States of America, in the interest of peace and security, is presently willing to maintain

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[1] Treaties and Other International Acts Series 2490.

certain of its armed forces in and about Japan, in the expectation, however, that Japan will itself increasingly assume responsibility for its own defense against direct and indirect aggression, always avoiding any armament which could be an offensive threat or serve other than to promote peace and security in accordance with the purposes and principles of the United Nations Charter.

Accordingly, the two countries have agreed as follows:

ARTICLE I

Japan grants, and the United States of America accepts, the right, upon the coming into force of the Treaty of Peace and of this Treaty, to dispose United States land, air and sea forces in and about Japan. Such forces may be utilized to contribute to the maintenance of international peace and security in the Far East and to the security of Japan against armed attack from without, including assistance given at the express request of the Japanese Government to put down large-scale internal riots and disturbances in Japan, caused through instigation or intervention by an outside power or powers.

ARTICLE II

During the exercise of the right referred to in Article I, Japan will not grant, without the prior consent of the United States of America, any bases or any rights, powers or authority whatsoever, in or relating to bases or the right of garrison or of maneuver, or transit of ground, air or naval forces to any third power.

ARTICLE III

The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments.

ARTICLE IV

This Treaty shall expire whenever in the opinion of the Governments of the United States of America and Japan there shall have come into force such United Nations arrangements or such alternative individual or collective security dispositions as will satisfactorily provide for the maintenance by the United Nations or otherwise of international peace and security in the Japan Area.

ARTICLE V

This Treaty shall be ratified by the United States of America and Japan and will come into force when instruments of ratification thereof have been exchanged by them at Waskington.

IN WITNESS WHEREOF the undersigned Plenipotentiaries have signed this Treaty.

DONE in duplicate at the city of San Francisco, in the English and Japanese languages, this eighth day of September, 1951.

For the United States of America:

DEAN ACHESON
JOHN FOSTER DULLES
ALEXANDER WILEY
STYLES BRIDGES

For Japan:

SHIGERU YOSHIDA.

Treaties and Other International Acts Series 2492

ADMINISTRATIVE AGREEMENT

Between the
UNITED STATES OF AMERICA
and JAPAN

- Signed at Tokio February 28, 1952
- Entered into force April 28, 1952

ADMINISTRATIVE AGREEMENT

UNDER ARTICLE III OF THE SECURITY TREATY BETWEEN THE UNITED STATES OF AMERICA AND JAPAN

PREAMBLE

Whereas the United States of American and Japan on September 8, 1951, signed a Security Treaty which contains provisions for the disposition of United States land, air and sea forces in and about Japan;

And whereas Article III of that Treaty states that the conditions which shall govern the disposition of the armed forces of the United States in and about Japan shall be determined by administrative agreements between the two Governments;

And whereas the United States of America and Japan are desirous of concluding practical administrative arrangements which will give effect to their respective obligations under the Security Treaty and will strengthen the close bonds of mutual interest and regard between their two peoples;

Therefore, the Governments of the United States of America and of Japan have entered into this Agreement in terms as set forth below:

* * * * *

ARTICLE II

1. Japan agrees to grant to the United States the use of the facilities and areas necessary to carry out the purposes stated in Article I of the Security Treaty. Agreements as to specific facilities and areas,

not already reached by the two Governments by the effective date of this Agreement, shall be concluded by the two Governments through the Joint Committee provided for in Article XXVI of this Agreement. "Facilities and areas" include existing furnishings, equipment and fixtures necessary to the operation of such facilities and areas.

* * * * *

4. (a) When facilities and areas such as target ranges and maneuver grounds are temporarily not being used by the United States armed forces, interim use may be made by Japanese authorities and nationals provided that it is agreed that such use would not be harmful to the purposes for which the facilities and areas are normally used by the United States armed forces.

(b) With respect to such facilities and areas as target ranges and maneuver grounds which are to be used by United States armed forces for limited periods of time, the Joint Committee shall specify in the agreements concerning such facilities and areas the extent to which the provisions of this Agreement shall apply.

ARTICLE III

1. The United States shall have the rights, power and authority within the facilities and areas which are necessary or appropriate for their establishment, use, operation, defense or control. . . .

* * * * *

ARTICLE XIV

1. Persons, including corporations organized under the laws of the United States, and their employees who are ordinarily resident in the United States and whose presence in Japan is solely for the purpose of

executing contracts with the United States for the benefit of the United States armed forces shall, except as provided in this Article, be subject to the laws and regulations of Japan.

* * * * *

7. Japanese authorities shall have the primary right to exercise jurisdiction over the persons and their employees referred to in paragraph 1 of this Article in relation to offenses committed in Japan and punishable by the law of Japan. In those cases in which the Japanese authorities decide not to exercise such jurisdiction they shall notify the military authorities of the United States as soon as possible. Upon such notification the military authorities of the United States shall have the right to exercise such jurisdiction over the persons referred to as is conferred on them by the law of the United States.

* * * * *

ARTICLE XVI

It is the duty of members of the United States armed forces, the civilian component, and their dependents to respect the law of Japan and to abstain from any activity inconsistent with the spirit of this Agreement, and, in particular, from any political activity in Japan.

ARTICLE XVII

1. Upon the coming into force with respect to the United States of the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces," signed at London on June 19, 1951, the United States will immediately conclude with Japan, at the option of Japan, an agreement on criminal

jurisdiction similar to the corresponding provisions of that Agreement.

2. Pending the coming into force with respect to the United States of the North Atlantic Treaty Agreement referred to in paragraph 1, the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality. **Such jurisdiction may in any case be waived by the United States.**

3. While the jurisdiction provided in paragraph 2 is effective, the following provisions shall apply:

* * * * *

ARTICLE XXVI

1. A Joint Committee shall be established as the means for consultation between the United States and Japan on all matters requiring mutual consultation regarding the implementation of this Agreement. In particular, the Joint Committee shall serve as the means for consultation in determining the facilities and areas in Japan which are required for the use of the United States in carrying out the purposes stated in Article I of the Security Treaty.

2. The Joint Committee shall be composed of a representative of the United States and of Japan, each of whom shall have one or more deputies and a staff. The Joint Committee shall determine its own procedures, and arrange for such auxiliary organs and administrative services as may be required. The Joint Committee shall be so organized that it may meet immediately at any time at the request of the representative of either the United States or Japan.

3. If the Joint Committee is unable to resolve any matter, it shall refer that matter to the respective governments for further consideration through appropriate channels.

ARTICLE XXVII

1. This Agreement shall come into force on the date on which the Security Treaty between the United States and Japan enters into force.

* * * * *

IN WITNESS WHEREOF the representatives of the two Governments, duly authorized for the purpose, have signed this Agreement.

DONE at Tokyo, in duplicate, in the English and Japanese languages, both texts authentic, this twenty-eighth day of February, 1952.

For the Government of the United States of America:

[SEAL] DEAN RUSK
EARL D. JOHNSON

For the Government of Japan:

[SEAL] K. OKAZAKI

EXCHANGE OF NOTES

United States Note to Japan.

TOKYO, *February 28, 1952*

EXCELLENCY:

I have the honor to refer to our discussion on the terms of the Administrative Agreement signed today, in which Your Excellency stated as the opinion of the

Japanese Government that, as the occupation of Japan by the Allied Powers comes to an end on the coming into force of the Treaty of Peace with Japan, the use of facilities and areas by United States forces on the basis of occupation requisition also comes to an end on the same date; thereafter, the use of facilities and areas by United States forces must be based upon agreement between the two Governments, subject to the rights which each might have under the Treaty of Peace with Japan, the Security Treaty, and the Administrative Agreement. I hereby confirm that such is also the opinion of the United States Government.

* * * * *

Accept, Excellency, the assurances of my highest consideration.

DEAN RUSK
Special Representative of the President
of the United States of America

Treaties and Other International Acts Series 2848

AMENDMENT OF ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT UNDER ARTICLE III OF THE SECURITY TREATY

Protocol, and Official Minutes,
between the UNITED STATES OF AMERICA
and JAPAN

Signed at Tokyo September 29, 1953

Entered into force October 29, 1953

PROTOCOL TO AMEND ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT UNDER ARTICLE III OF THE SECURITY TREATY BETWEEN THE UNITED STATES OF AMERICA AND JAPAN

Whereas the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces", signed at London on June 19, 1951, [1] came into force on August 23, 1953 with respect to the United States of America; and

Whereas Japan desires to conclude with the United States of America an agreement on criminal jurisdiction similar to the corresponding provisions of the said Agreement in accordance with the provisions of paragraph 1 of Article XVII of the Administrative Agreement, signed at Tokyo on February 28, 1952, [2] under Article III of the Security Treaty [3] between the United States of America and Japan;

Now, the Governments of the United States of America and Japan have agreed that the existing provisions of Article XVII of the said Administrative Agreement shall be abrogated and the following provisions shall be substituted:

Article XVII

1. Subject to the provisions of this Article,

(a) the military authorities of the United States shall have the right to exercise within

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[1] Treaties and Other International Acts Series 2846.

[2] TIAS 2492.

[3] TIAS 2491.

Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States;

(b) the authorities of Japan shall have jurisdiction over the members of the United States armed forces, the civilian component, and their dependents with respect to offenses committed within the territory of Japan and punishable by the law of Japan.

2. (a) The military authorities of the United States shall have the right to exercise exclusive jurisdiction over persons subject to the military law of the United States with respect to offenses, including offenses relating to its security, punishable by the law of the United States, but not by the law of Japan.

(b) The authorities of Japan shall have the right to exercise exclusive jurisdiction over members of the United States armed forces, the civilian component, and their dependents with respect to offenses, including offenses relating to the security of Japan, punishable by its law but not by the law of the United States.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States

armed forces or the civilian component in relation to

(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent;

(ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the United States to exercise jurisdiction over persons who are nationals of or ordinarily resident in Japan, unless they are members of the United States armed forces.

5. (a) The military authorities of the United States and the authorities of Japan shall assist each other in the arrest of members of the United States armed forces, the civilian component, or their dependents in the territory of Japan and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

(b) The authorities of Japan shall notify promptly the military authorities of the United States of the arrest of any member of the United States armed forces, the civilian component, or a dependent.

(c) The custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged by Japan.

6. (a) The military authorities of the United States and the authorities of Japan shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

(b) The military authorities of the United States and the authorities of Japan shall notify each other of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.

7. (a) A death sentence shall not be carried out in Japan by the military authorities of the United States if the legislation of Japan does not provide for such punishment in a similar case.

(b) The authorities of Japan shall give sympathetic consideration to a request from the military authorities of the United States for assistance in carrying out a sentence of imprisonment pronounced by the military authorities of the United States under the provisions of this Article within the territory of Japan.

8. Where an accused has been tried in accordance with the provisions of this Article either by the military authorities of the United States or the authori-

ties of Japan and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the territory of Japan by the authorities of the other State. However, nothing in this paragraph shall prevent the military authorities of the United States from trying a member of its armed forces for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of Japan.

9. Whenever a member of the United States armed forces, the civilian component or a dependent is prosecuted under the jurisdiction of Japan he shall be entitled:

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;

(d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of Japan;

(e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan;

(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the United States and to have such a representative present at his trial.

10. (a) Regularly constituted military units or formations of the United States armed forces shall have the right to police any facilities or areas which

they use under Article II of this Agreement. The military police of such forces may take all appropriate measures to ensure the maintenance of order and security within such facilities and areas.

(b) Outside these facilities and areas, such military police shall be employed only subject to arrangements with the authorities of Japan and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the United States armed forces.

11. In the event of hostilities to which the provisions of Article XXIV of this Agreement apply, either the United States or Japan shall have the right, by giving sixty days' notice to the other, to suspend the application of any of the provisions of this Article. If this right is exercised, the United States and Japan shall immediately consult with a view to agreeing on suitable provisions to replace the provisions suspended.

The present Protocol shall come into effect thirty day after the date of its signing.

IN WITNESS WHEREOF the representatives of the two Governments, duly authorized for the purpose, have signed the present Protocol.

DONE at Tokyo, in duplicate, in the English and Japanese languages, both texts being equally authentic, this twenty-ninth day of September, 1953.

For the Government of the United States of America:

[SEAL] JOHN M. ALLISON

For the Government of Japan:

[SEAL] KATSUO OKAZAKI
TAKESHI INUKAI

AGREED OFFICIAL MINUTES REGARDING PROTOCOL TO AMEND ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND JAPAN

Re paragraph 1 (a) and paragraph 2 (a):

The scope of persons subject to the military law of the United States shall be communicated, through the Joint Committee, to the Government of Japan by the Government of the United States.

Re paragraph 2 (c):

Both Governments shall inform each other of the details of all the security offenses mentioned in this subparagraph and the provisions governing such offenses in the existing laws of their respective countries.

Re paragraph 3 (a) (ii):

Where a member of the United States armed forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that the alleged offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

The above statement shall not be interpreted to prejudice in any way Article 318 of the Japanese Code of Criminal Procedure.

Re paragraph 3 (c):

1. Mutual procedures relating to waivers of the primary right to exercise jurisdiction shall be determined by the Joint Committee.

2. Trials of cases in which the Japanese authorities have waived the primary right to exercise jurisdiction, and trials of cases involving offenses described in paragraph 3 (a) (ii) committed against the State or nationals of Japan shall be held promptly in Japan within a reasonable distance from the places where the offenses are alleged to have taken place unless other arrangements are mutually agreed upon. Representatives of the Japanese authorities may be present at such trials.

Re paragraph 4:

Dual nationals, United States and Japanese, who are subject to the military law of the United States and are brought to Japan by the United States shall not be considered as nationals of Japan, but shall be considered as United States nationals for the purposes of this paragraph.

Re paragraph 5:

1. In case the Japanese authorities have arrested an offender who is a member of the United States armed forces, the civilian component, or a dependent subject to the military law of the United States with respect to a case over which Japan has the primary right to exercise jurisdiction, the Japanese authorities will, unless they deem that there is adequate cause and necessity to retain such offender, release him to the custody of the United States military authorities provided that he shall, on request, be made available to the Japanese authorities, if such be the condition of his release. The United States authorities shall, on request, transfer his custody to the Japanese authorities at the time he is indicted by the latter.

2. The United States military authorities shall promptly notify the Japanese authorities of the arrest of any member of the United States armed forces, the civilian component or a dependent in any case in which Japan has the primary right to exercise jurisdiction.

Re paragraph 9:

1. The rights enumerated in items (a) through (e) of this paragraph are guaranteed to all persons on trial in Japanese courts by the provisions of the Japanese Constitution. In addition to these rights, a member of the United States armed forces, the civilian component or a dependent who is prosecuted under the jurisdiction of Japan shall have such other rights as are guaranteed under the laws of Japan to all persons on trial in Japanese courts. Such additional rights include the following which are guaranteed under the Japanese Constitution:

(a) He shall not be arrested or detained without being at once informed of the charge against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel;

(b) He shall enjoy the right to a public trial by an impartial tribunal;

(c) He shall not be compelled to testify against himself;

(d) He shall be permitted full opportunity to examine all witnesses;

(e) No cruel punishments shall be imposed upon him.

2. The United States authorities shall have the right upon request to have access at any time to members of the United States armed forces, the civilian component, or their dependents who are confined or detained under Japanese authority.

3. Nothing in the provisions of paragraph 9 (g) concerning the presence of a representative of the United States Government at the trial of a member of the United States armed forces, the civilian component or a dependent prosecuted under the jurisdiction of Japan, shall be so construed as to prejudice the provisions of the Japanese Constitution with respect to public trials.

Re paragraphs 10 (a) and 10 (b):

1. The United States military authorities will normally make all arrests within facilities and areas in use by and guarded under the authority of the United States armed forces. This shall not preclude the Japanese authorities from making arrests within facilities and areas in cases where the competent authorities of the United States armed forces have given consent, or in cases of pursuit of a flagrant offender who has committed a serious crime.

Where persons whose arrest is desired by the Japanese authorities and who are not subject to the jurisdiction of the United States armed forces are within facilities and areas in use by the United States armed forces, the United States military authorities will undertake, upon request, to arrest such persons. All persons arrested by the United States military authorities, who are not subject to the jurisdiction of the United States armed forces, shall immediately be turned over to the Japanese authorities.

The United States military authorities may, under due process of law, arrest in the vicinity of a facility or area any person in the commission or attempted commission of an offense against the security of that facility or area. Any such person not subject to the jurisdiction of the United States armed forces shall immediately be turned over to the Japanese authorities.

2. The Japanese authorities will normally not exercise the right of search, seizure, or inspection with respect to any persons or property within facilities and areas in use by and guarded under the authority of the United States armed forces or with respect to property of the United States armed forces wherever situated, except in cases where the competent authorities of the United States armed forces consent to such search, seizure, or inspection by the Japanese authorities of such persons or property.

Where search, seizure, or inspection with respect to persons or property within facilities and areas in use by the United States armed forces or with respect to property of the United States armed forces in Japan is desired by the Japanese authorities, the United States military authorities will undertake, upon request, to make such search, seizure, or inspection. In the event of a judgment concerning such property, except property owned or utilized by the United States Government or its instrumentalities, the United States will turn over such property to the Japanese authorities for disposition in accordance with the judgment.

Re application of the Protocol:

The provisions of the Protocol shall not apply to any offenses committed before the coming into

effect of the Protocol. Such cases shall be governed by the provisions of Article XVII of the Administrative Agreement as it existed prior to the coming into effect of the Protocol.

JOHN M. ALLISON
Ambassador Extraordinary and Plenipotentiary of the United States of America.

KATSUO OKAZAKI
Minister for Foreign Affairs of Japan.

TAKESHI INUKAI
Minister of Justice of Japan.

TOKYO, *September 29, 1953.*

AGREED VIEWS

SUB-COMMITTEE ON JURISDICTION

ADMINISTRATIVE AGREEMENT MATTERS

CRIMINAL PANEL

The matters of procedure, definition and interpretation set out below have been agreed to by the United States and Japanese members of the Criminal Panel, Jurisdiction Sub-committee, with respect to the Protocol and Official Minutes of 29 September 1953, amending Article XVII of the Administrative Agreement between the United States and Japan. These matters were approved by the Joint Committee under Article XXVI of the Administrative Agreement as follows:

* * * * *

Agreed Views No. 37 through No 43 . . . Approved 29 October 1953, effective 28 October 1953

* * * * *

PART II

EXERCISE OF JURISDICTION

* * * * *

No 39: The term "official duty" as referred to in paragraph 3 (a) (ii) of the Protocol and Official Minutes relating thereto is understood to be any duty or service required or authorized to be done by stat-

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ute, regulation, the order of a superior or military usage.

* * * * *

[Criminal Jurisdiction in Japan, Headquarters, Far East Command, APO 500, FEC Pamphlet No. 27–1, January 1956, pp. 7, 14]

UNITED STATES ARMY FORCES, FAR EAST
AND
EIGHTH UNITED STATES ARMY (REAR)
CIRCULAR 22–1

ADMINISTRATION OF MILITARY JUSTICE AND RELATED MATTERS

24 January 1956

* * * * * *

23. ACTS OR OMISSIONS ARISING FROM OFFICIAL DUTY.—*a.* General.—The United States has the primary right to exercise jurisdiction over offenses arising from an act or omission of a member or civilian employee of the United States armed forces arising from the performance of official duty. (See para 3, Article XVII.) The term "official duty" as used in Article XVII, Official Minutes, and the Agreed Views is not meant to include all acts by members of the armed forces and civilian component during periods while they are on duty, but is meant to apply only to acts which are required to be done as a function of those duties which the individuals are performing. Thus, a substantial departure from the acts a person is required to perform in a particular duty usually will indicate an act outside of his "official duty." [page 21]

* * * * * *

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APPENDIX B

In the United States District Court for the District of Columbia

H. C. 47–57

WILLIAM S. GIRARD, UNITED STATES ARMY SPECIALIST 3/C, PETITIONER

vs.

CHARLES E. WILSON, SECRETARY OF DEFENSE; JOHN FOSTER DULLES, SECRETARY OF STATE; WILBUR M. BRUCKER, SECRETARY OF THE ARMY; GENERAL MAXWELL D. TAYLOR, HEAD JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE; MAJOR GENERAL W. H. MAGLIN, PROVOST MARSHAL GENERAL, UNITED STATES ARMY; GENERAL LYMAN LEMNITZER, COMMANDING GENERAL, FAR EAST COMMAND; RESPONDENTS.

OPINION

This is a Petition for a Writ of Habeas Corpus and for other relief, filed by William S. Girard, United States Army Specialist Third Class, against the Secretary of Defense and others, in which he alleges that on or about January 30, 1957, he was arrested and thereafter held in confinement by the military authorities of the United States and is presently held in such confinement for the purpose of being delivered to the Government of Japan for trial for an alleged offense over which that Government has no jurisdiction, nor does it have jurisdiction over

the person of the petitioner. He further alleges that his detention is illegal and in violation of the Constitution and laws of the United States, as well as the treaty rights and obligations of the Government of the United States, and that the reasons for his detention and proposed delivery to the Japanese Government are invalid in law and in violation of fundamental constitutional and legal rights of petitioner.

The petitioner is a Specialist Third Class in the Regular Army of the United States, assigned to Company F, 8th Cavalry Regiment, at Camp Whittington, Honshu, Japan, having reenlisted while in Japan on October 28, 1954, for a period of three years.

On January 30, 1957, an incident occurred while the petitioner was on a firing range known as Camp Weir Range in Japan, resulting in the death of a Japanese woman for which the American military authorities propose to deliver petitioner to the Japanese Government for trial.

The incident is succinctly described in the certificate of the petitioner's commanding officer dated February 7, 1957, from which the following is quoted:

> "* * * I certify that GIRARD, William S. RA16452809, Specialist Third Class, Company F, 8th Cavalry Regiment, APO 201, was in the performance of his official duty at 1350 hours, 30 January 1957, Camp Weir Range Area, when he was involved in the following incident: On 30 January 1957, 2nd Battalion, 8th Cavalry Regiment, was engaged in routine training at Camp Weir Range Area. Company F was conducting blank firing exercises. Specialist Third Class William S. GIRARD was instructed by his platoon leader to move near a position near an unguarded machine gun to guard the machine gun and items of field equipment that

were in the immediate area. GIRARD, following instructions, moved to the designated position near the machine gun. While performing his duties as guard, he fired an expended cartridge case, as a warning, which struck and killed SAKAI, Naka, Kami-Shinden, Somamura, Gumma Prefecture, who had entered the range area for the purpose of gathering expended cartridge cases."

This certificate has never been withdrawn or modified in any respect.

The Security Treaty between the United States of America and Japan which entered into force on April 28, 1952, provided by Article III thereof that:

> "The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments."

Article XVII of the Administrative Agreement subsequently entered into between the Governments of the United States of America and Japan, defines the offenses of which the countries have concurrent jurisdiction and exclusive jurisdiction, respectively.

Paragraph 3 of Article XVII provides that with respect to cases where the right to exercise jurisdiction is concurrent, the military authorities of the United States shall have the *primary right* to exercise jurisdiction over the members of the United States armed forces or the civilian component *in relation to offenses arising out of any act or omission done in the performance of official duty.* (Italics supplied.)

The Agreed Official Minutes regarding this provision in Paragraph 3 provide that where a member of the United States armed forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that

the alleged offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

It was pursuant to these Official Minutes that the certificate of the petitioner's commanding officer was issued dated Februry 7, 1957.

The certificate by the commanding officer which was directed to the Chief Procurator, Maebashi District, Maebashi City, Honshu, Japan, continued by stating: "The United States will exercise jurisdiction in this case unless notification is given immediately that proof to the contrary exists."

Thereafter, on February 9, 1957, the Chief Procurator notified the petitioner's commanding officer with reference to his certificate as to official duty that "This office considers the proof contrary thereto exists, basing upon our examinations."

Following this exchange, there were discussions commencing in early March, 1957, by the representatives of the United States and representatives of Japan constituting a Joint U. S.—Japan Committee. On May 16, 1957, the United States representative on the Committee agreed that the United States would not exercise its asserted right of primary jurisdiction in this case. This action is said to have been taken in accordance with Paragraph 3 (c) of Article XVII of the Administrative Agreement, which reads as follows:

> "If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in

cases where that other State considers such waiver to be of particular importance."

Thereafter, on June 4, 1957, the Secretary of State of the United States and the Secretary of Defense of the United States who are named as two of the defendants in this action, issued a joint statement that they had carefully reviewed all of the available facts in this case, and have now concluded that the agreement that the petitioner be tried in the courts of Japan was reached in full accord with procedures established by the Treaty and Agreement, and that in order to preserve the integrity of the pledges of the United States, this determination by the Joint Committee must be carried out.

This joint statement related the circumstances substantially the same as, but in more detail than, those contained in the certificate by the petitioner's commanding officer. The following is quoted from the joint statement:

"* * * * *

"The incident occurred in a maneuver area provided by the Japanese Government for part-time use of United States forces. The Japanese Defense Force uses the same area about 40% of the time. When the area is not in use by either the United States or Japanese armed forces, Japanese civilians are permitted to farm or otherwise use the area.

"Efforts to keep civilians away from the area during such military exercises have not proved effective. In this particular case, red boundary flags were, as customary, erected as a warning to civilians to keep off, and local authorities were notified of the proposed exercises. But, as was frequently the case, a number of Japanese civilians were in the area gathering empty brass cartridge cases at the time of the incident. These civilians had created such a risk of injury

to themselves in the morning exercises when live ammunition was used that the American officer in charge withdrew live ammunition from the troops prior to the afternoon exercises. In the interval between two simulated attacks during the afternoon, Girard and another soldier, Specialist 3rd Class Victor M. Nickel, were ordered by their platoon leader, a Lieutenant, to guard a machine gun and several field jackets at the top of a hill. Girard and Nickel were not issued live ammunition for this duty.

"It was while these soldiers were performing this duty that the incident occurred. Mrs. Naka Sakai, a Japanese civilian, died a few moments after being hit in the back by an empty brass rifle shell case fired by Girard from his rifle grenade launcher. She was not over 30 yards from Girard and was going away from him when he fired the rifle. Girard had previously fired similarly in the vicinity of a Japanese man, who was not hit.

"Girard's action in firing empty shell cases from the rifle grenade launcher was not authorized. He asserted that he fired from the waist, intending only to frighten the Japanese civilians. Others stated, but Girard denied, that empty shell cases were thrown out to entice the Japanese to approach.

"* * * * *"

The joint statement relates that "The Commanding General of Girard's Division certified that Girard's action was done in performance of official duty".

The joint statement further relates that during the course of the meetings between the United States and Japanese representatives, while consideration was given to referring the matter in dispute to the two Governments for settlement, this procedure was rejected as inadvisable under the circumstances, and instructions were issued that the United States representative on the Joint Committee should continue to

press the claim for jurisdiction, but that, in case of continued deadlock, the United States representative was authorized to waive jurisdiction to Japan. After three weeks of additional negotiations "The U. S. representative waived jurisdiction in the name of the United States."

Thereafter, Girard was indicted by the Japanese judicial authorities for causing a death by wounding and at the present time he is administratively restricted to the limits of Camp Whittington.

The joint statement of the Secretaries was released on June 4, 1957 and the petition for Writ of Habeas Corpus was filed in this Court on June 6, 1957; an Order to Show Cause was issued the same day returnable on June 11, 1957, to which the respondents made return with accompanying exhibits, and the cause submitted for decision after full argument.

The decision of this case does not determine the guilt or innocence of the petitioner. The issue here is what tribunal should determine that question, and does the petitioner have a constitutional right which would be violated if he should be delivered to the Japanese Government for trial.

Nor is the question whether or not the petitioner would receive a fair trial if delivered to the Japanese Government for trial.

An affidavit of the General Counsel, Department of Defense, details the experience of the three United States Armed Services in Japan since the effective date of the Administrative Agreement in Japan and states that in a few instances suggestions of possible infringement of the rights of the accused have been made by an observer; that subsequent investigation by the Field Commander of the accused's has, in each instance, refuted or dispelled the suggestion and to date there has been no instance of the exercise by

Japan of criminal jurisdiction over United States personnel in which the conduct of the proceedings has disclosed a basis for diplomatic intervention.

On the basis of this experience, it is assumed that the petitioner would receive a fair trial if the defendants should deliver the petitioner to the Japanese Government for trial under the Japanese Constitution and laws.

The question which this Court must decide is whether the petitioner has a right under the Constitution of the United States to be tried for the alleged offense in an appropriate American tribunal and would that constitutional right be violated if he is delivered to the Japanese Government for trial.

It is uncontroverted that the petitioner at the time of the alleged occurrence was acting as a member of the American armed forces in the performance of his official duties as guard.

The certificate of the petitioner's commanding officer relates that petitioner "was instructed by his platoon leader to move near a position near an unguarded machine gun to guard the machine gun and items of field equipment that were in the immediate area"; that petitioner "*following instructions*, moved to the designated position near the machine gun" and "*while performing his duties as guard*" he fired the expended cartridge case. (Italics supplied.)

The joint statement issued by the Secretary of State and the Secretary of Defense, after relating the guard duty assigned to the petitioner and another soldier, states "*It was while these soldiers were performing this duty that the incident occurred.*" The joint statement further says that "the Commanding General of Girard's division certified that Girard's action was done in performance of official duty". (Italics supplied.)

the American Armed Forces in the performance of official duty, the Uniform Code of Military Justice establishes every procedure to be followed.

Since the petitioner's act was committed in the performance of official duty, under the principles announced by the Supreme Court in the case of *In Re Neagle*, 135 U. S. 1, the petitioner is accountable only to United States Federal jurisdiction for any act or omission. Additional authorities in support of this proposition are *Johnson* vs. *State of Maryland*, 254 U. S. 51; *Brown* vs. *Cain*, 56 F. Supp. 56; *Lima* vs. *Lawler*, 63 F. Supp. 446; *Colorado* vs. *Maxwell*, 125 F. Supp. 18; *In Re Fair, et al.*, 100 Fed. 149; *In Re Wulzen*, 235 Fed. 362.

In some of these cases, the factual situation was in dispute and required lengthy hearings to determine if the petitioner was acting in performance of official duty. Not so in the instant case, since the status of the petitioner is conceded.

The defendants placed reliance upon the decisions of this Court in the cases of *May* vs. *Wilson*, C. A. No. 128–56; D. C., D. C.; and *Cozart* vs. *Wilson*, 98 U. S. App. D. C. 437, 236 F. 2d, 732. Both of these cases arose out of offenses committed when the petitioners were off duty and, therefore, factually are distinguishable from the case now under consideration. *May* was not appealed, and in *Cozart* the Supreme Court granted a Petition for Writ of Certiorari and vacated the judgment of the Court of Appeals, remanding the case to the District Court with directions to dismiss the petition for Writ of Habeas Corpus upon the ground that the cause is moot. 352 U. S. 884. In pursuing this procedure, the Supreme Court cited *United States* vs. *Munsingwear, Inc.* 340 U. S. 36, which states "that procedure clears the path for future relitigation of the issues between the parties and

eliminates a judgment, review of which was prevented through happenstance."

Counsel for the defendants also cite cases in support of the proposition that "the jurisdiction of a Court-Martial is not exclusive and does not preempt the jurisdiction of state courts to deal with acts which violate state law as well as military law."

In none of the cases cited in support of this proposition were the accused charged with an offense performed in line of duty.

In *Caldwell* vs. *Parker*, 252 U. S. 376, the petitioner was charged with murder of a civilian at a place within the jurisdiction of the State of Alabama and not within the confines of any camp or place subject to the control of the civil or military authorities of the United States. *Kennedy* vs. *Sanford*, 166 F. 2d 568, related to a charge of conspiracy; *United States* vs. *Matthews*, 49 F. Supp. 203, was a charge of rape; and *United States* vs. *Canella*, 63 F. Supp. 377, related to a charge of bribery. Clearly these cases are distinguishable from the facts in the instant case.

Counsel for defendants further cite a series of cases in support of the proposition that "if there is any question as to whether a particular act was strictly within the scope of the authority of the soldier or whether such act constituted the only means available to perform the assigned duty, then the state court rather than a court-martial must be allowed to proceed with the case." These decisions are not in point in view of the stipulation that there is no issue of material fact with respect to the status of the petitioner at the time of the incident.

Applying the same constitutional protection to the petitioner against his delivery to a foreign State that would be applied to his delivery for prosecution in a state court, it follows that the threatened action by

the defendants is illegal and in violation of the Constitution and laws of the United States.

The petition is for a Writ of Habeas Corpus which appears to be authorized by *Cozart* vs. *Wilson, supra,* and *Eisentrager, et al.* vs. *Forrestal,* 84 U. S. App. D. C. 396, 174 F. 2d 961, since the petitioner is administratively restricted to the limits of Camp Whittington and, therefore, he is sufficiently restrained for the purposes of habeas corpus. However, since the petitioner remains a member of the United States Armed Forces in Japan and may be prosecuted in Court-Martial proceedings for the offense with which he is charged, the petition for the Writ will be denied and the Court will treat the complaint as a Petition for Declaratory Judgment and Injunction under the prayer of the complaint for other relief and, as such, will decree that the proposed delivery of the petitioner to the Japanese Government would violate rights of the petitioner guaranteed by the Constitution of the United States and will be enjoined.

This opinion may be treated as the Court's Findings of Fact and Conclusions of Law, and counsel for petitioner will submit an appropriate order in conformity herewith.

Joseph C. McGarraghy,
(sgd) JOSEPH C. MCGARRAGHY,
Judge.

JUNE 18, 1957.

In the United States District Court for the District of Columbia

H. C. 47–57

WILLIAM S. GIRARD, PETITIONER

v.

CHARLES E. WILSON, ET AL., RESPONDENTS.

ORDER

This matter having come on for hearing upon the petition for writ of habeas corpus and the Court having considered the petition, the Return and Answer to Rule to Show Cause and all the exhibits filed herein, and after a full and fair hearing having been accorded the parties thereto, it is by the Court this 18th day of June, 1957,

ORDERED, that in accordance with the Opinion filed this date, the petition for writ of habeas corpus is denied, the rule to show cause is discharged, and that respondents and those over whom they exercise command function be, and they hereby are, enjoined from delivering petitioner to the Japanese Government.

(s) JOSEPH C. MCGARRAGHY, *Judge.*

APPENDIX C

THE GENERAL POWER OF THE PRESIDENT TO ENTER INTO EXECUTIVE AGREEMENTS[1]

In considering the validity of an executive agreement, the basic axiom is that, as a sovereign state, the United States possesses, in its dealing with other states, all of the normal powers of a fully independent nation, subject to constitutional limitations like the Bill of Rights which govern all exercise of governmental authority in this country. These foreign affairs powers have been mainly entrusted to the President who is the country's organ in its relations with other nations. The Treaty Clause of the Constitution (Article II, Section 2) provides for Senate participation where a treaty is involved, but the United States can consummate agreements which are not treaties in the constitutional sense and do not require Senate action, and the President has authority to make such arrangements, acting alone, in appropriate fields and within appropriate limits.

1. *The plenary foreign relations power of the United States.*—It is often said that under our Constitution the "federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted" (see, *e. g.*, *United States* v. *Butler*, 297 U. S. 1, 63). But, as the Court has

[1] Almost all of this material was included in the Brief for the United States in *United States* v. *Guy W. Capps, Inc.*, Oct. Term, 1954, No. 14.

pointed out repeatedly, care must be taken to limit this characterization of our national government to its proper province, *i. e.*, the field of internal affairs (*Carter* v. *Carter Coal Co.*, 298 U. S. 238, 295; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 315–318; and *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, concurring opinions of Justices Frankfurter and Jackson at 610, and 635–636, fn. 2). For it is the basis of our constitutional plan that we are several as to all domestic matters—except so far as authority has been expressly delegated to the Federal Government—and one as to all foreign affairs.[2]

Accordingly, this Court indicated from the very outset that the Federal Government had all the rights of external sovereignty—not merely those expressly delegated to it in the Constitution. Cf. *Penhallow* v. *Doane*, 3 Dall. 54, 80–81, 92–96; *Ware* v. *Hylton*, 3 Dall. 199, 232. Despite some dispute as to the source of the full rights of external sovereignty held by the national government,[3] there is agreement that under

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[2] Cf. Thomas Jefferson's letters of August 14, 1787, to George Washington and Joseph Jones quoted in Warren, *The Making of the Constitution* (1937 ed.) 451; and see the concurring opinion of Mr. Justice Frankfurter in *United States* v. *Pink*, 315 U. S. 203, 242: "In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states."

[3] Some have believed that external sovereignty passed directly from the British crown to the Continental Congress and from it, through the Confederation, to the present United States, and was never possessed by the several States. See Mr. Justice Chase in *Ware* v. *Hylton*, 3 Dall. 199, 232. The famous holdings of Mr. Justice Paterson in *Penhallow* v. *Doane*, 3 Dall. 54, 80–81, and of Chief Justice Jay in *Chisholm* v. *Georgia*, 2 Dall. 419, 470–471, place the same interpretation on the historic

our constitutional plan full sovereignty in external affairs is vested in the Federal Government and that the country possesses all the normal powers of a sovereign nation. See Corwin, *The President, Office and Powers* (1948 ed.) pp. 209–213. The Court has consistently held that this country is "invested with power over all the foreign relations of the country" (*Knox* v. *Lee*, 12 Wall. 457, 555, Bradley, J., concurring) or "with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective." *Fong Yue Ting* v. *United States*, 149 U. S. 698, 711; see also *Burnet* v. *Brooks*, 288 U. S. 378, 396; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; and *Mackenzie* v. *Hare*, 239 U. S. 299, 311.[4] The contents and

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events leading to the formation of the Union. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 316–317. To the same effect, see Story, *Commentaries on the Constitution* (5th ed.), Secs. 198–217, especially Sec. 216; Miller, *Lectures on the Constitution, Davis' Notes*, 35–37; Butler, *The Treaty Making Power of the United States*, Vol. I, Secs. 22–36; 143–162; George Sutherland, *Constitutional Power and World Affairs*, 37–38, 44–45, 116–118.

On the other hand, Mr. Justice Iredell felt, in *Penhallow* v. *Doane*, 3 Dall. 54, 92–96, that external sovereignty was originally held by the States, which irrevocably transferred all of its incidents to the nation. To the same effect see *e. g.*, Attorney General Cushing, 8 Op. Atty. Gen. 411, 415, and James Brown Scott, *Proceedings of the American Society of International Law*, Vol. 28, p. 2, at 8–10; Levitan, *The Foreign Relations Power*, 55 Yale L. J. 467.

[4] As stated by the late Mr. Justice (then Senator) Sutherland: "The sovereign will of the Nation is embodied in the Constitution and its exercise by the government is measured thereby; but in the one case [internal affairs] it is manifested by what that instrument affirms and in the other case [external affairs] by what it fails to negative." George Sutherland, *Constitutional Powers and World Affairs* (1919), 47. See also

scope of the nation's foreign relations power have been largely developed from the rules of international law concerning sovereignty, rather than found in any specific constitutional grant. *Jones* v. *United States*, 137 U. S. 202, 212; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707–711; Cf. *Mackenzie* v. *Hare*, 239 U. S. 299, 311.[5]

2. *The President's role in the conduct of foreign affairs.*—The first draft of the Constitution, submitted by Mr. Pinckney on May 29, 1787, followed the example of Art. IX of the Articles of Confederation. It placed the foreign relations powers in the Senate[6] by giving it the "sole and exclusive power * * * to make treaties and to appoint Ambassadors" (Art. VII), while reserving to the President merely the ceremonial function of "receiv[ing] public Ministers from foreign nations" (Art. VIII).[7]

Further reflection, however, convinced the members of the Constitutional Convention that the transaction of foreign relations, especially in view of its need for speed and secrecy, was essentially an executive function, to be subject to Senatorial control in those instances where the gravity of possible commitments made such checks desirable.[8] As early as June 18, 1787, Alexander Hamilton submitted a constitutional

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Chae Chan Ping v. *United States* (*The Chinese Exclusion Case*), 130 U. S. 581, 604.

[5] Cf. George Sutherland, *The Powers of the National Government*, Sen. Doc. No. 417, 61st Cong., 2d Sess., p. 7.

[6] 2 Curtis, *History of the Constitution of the United States*, 410.

[7] 3 Farrand, *Records of the Federal Convention*, 599.

[8] *The Federalist*, Nos. 64 and 75; Mr. Davie's Speech in the North Carolina Convention, 3 Farrand, *Records of the Federal Convention*, 347–399.

sketch which shifted the power to make treaties and to appoint ambassadors to the President, under Senatorial control.[9] On August 15, Mr. Mercer declared that the Senate ought not to have the treaty-making power, since it was an executive function.[10] A week later, on August 23, James Madison remarked that the President should take part in the making of treaties, since the Senate represented the States alone.[11]

Viewed against this background, the final constitutional text discloses a deliberate design to place the foreign relations power in the President, subject to the controls expressly provided for. This is the way the Constitution was understood almost from the beginning. On April 24, 1790, Thomas Jefferson, then Secretary of State, gave the following official opinion:

> * * * The transaction of business with foreign nations is Executive altogether. It belongs, then, to the head of that department except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.[12]

Ten years later, on March 7, 1800, during the debate involving the extradition of Jonathan Robbins, John

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[9] 1 Farrand, *Records of the Federal Convention*, 292; see also 3 Farrand, *ibid.*, 619, 624–625.

[10] 2 Farrand, *ibid.*, 297.

[11] 2 Farrand, *ibid.*, 392.

[12] *The Writings of Thomas Jefferson* (Memorial ed.), Vol. III, pp. 15, 16. See also the similar remarks of Madison in the House of Representatives, *Annals of Congress*, 1st Congress, cols. 463–464, 496, and Crosskey, *Politics and the Constitution of the United States*, Vol. 1, pp. 417–418.

Marshall stated in the House of Representatives, of which he was then a member:

> * * * The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. * * *
>
> * * * * *
>
> The Executive is not only the Constitutional department, but seems to be the proper department to which the power in question may most wisely and most safely be confided.
>
> The department which is entrusted with the whole foreign intercourse of the nation * * *.[13]

It is noteworthy that this statement, limited to the conduct of *foreign affairs,* did not arouse antagonism such as that brought on by Hamilton's assertion in the Pacificus papers that the President had all the *executive* powers.[14] On the contrary, it persuaded a large portion of the Republican opposition and secured the support of the administration, and obtained a vote of 61 to 35 in a House almost evenly divided on a party basis.[15] See also the Report of the Senate Committee on Foreign Relations, of February 15, 1816, partially quoted in *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 319.

It is unnecessary to recall in detail that the Court has repeatedly reaffirmed, in recent years, the conceptions underlying Jefferson's and Marshall's declarations. "In this vast external realm, with

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[13] *Annals of Congress,* 6th Congress, cols. 613–614.

[14] Cf. the *Helvidius Papers,* 1 Madison, *Letters and Writings* 607–654.

[15] Beveridge, *The Life of John Marshall,* Vol. 2, pp. 473–475. The shrinkage of the Senate's role in the negotiation of treaties, in which it has an express place under the Constitution, has often been told. See Corwin, *The President—Office and Powers* (1948 ed.), pp. 253 ff.

its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. * * * the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–320; see also *United States* v. *Belmont*, 301 U. S. 324, 330; *United States* v. *Pink*, 315 U. S. 203, 222–223, 229–230; *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 109; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 542; cf. *Latvian State Cargo and Passenger Steamship Line* v. *McGrath*, 188 F. 2d 1000 (C. A. D. C.), certiorari denied, 342 U. S. 816; *The Maret*, 145 F. 2d 431 (C. A. 3); *Bernstein* v. *Van Heyghen Freres S. A.*, 163 F. 2d 246, 249 (C. A. 2), certiorari denied, 332 U. S. 772.

3. *The Treaty Clause and executive agreements.* Under Article II, Section 2, of the Constitution, the President

> shall have Power, by and with the Advice and Consent of the Senate, to make Treaties * * *.

"Treaties," however, are not the only means by which international transactions are conducted. Diplomatic practice recognizes a number of other less formal arrangements, such as *modi vivendi*, exchanges of notes, and other executive agreements—"a bargain between independent states which is something less than a treaty"[16]—without which, in the words of

[16] Baldwin, *The United States as a Great Power*, 9 Yale Review (Old Series) 399, 414.

John Bassett Moore, "current diplomatic business could not be carried on."[17] As a sovereign nation, the United States has, and must have, the capacity to enter into these lesser agreements (*supra*, pp. 52a–55a). Since the President is the nation's instrument in external affairs (*supra*, pp. 55a–58a), his is the department empowered to make such agreements, unless the Constitution provides otherwise in the Treaty Clause. But that carefully drawn clause does not stand in the way. Its terms and history, as well as the practice of a century and a half and the decisions of this Court, show that the formal treaty, consented to by the Senate, is not the only

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[17] Moore, *Treaties and Executive Agreements*, 20 Political Science Quarterly 385, 389.

On executive agreements, see, generally, Hackworth, *Digest of International Law*, Vol. 5, pp. 392–397; 5 Moore, *International Law Digest*, 210–221; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), 102; Baldwin, *The United States as a Great Power*, 9 Yale Review (Old Series) 399; Foster, *The Treaty-Making Power under the Constitution*, 11 Yale L. J. 69; Barnett, *International Agreements without the Advice and Consent of the Senate*, 15 Yale L. J. 18, 63; Sayre, *The Constitutionality of the Trade Agreements Act* (1939), 39 Col. L. Rev. 751; Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States* (1940), 35 Ill. L. Rev. 365; Riesenfeld, *International Relations*, 25 Cal. L. Rev. 643, 670–672; Borchard, *Executive Agreements and Treaties*, 53 Yale L. J. 664, 669–670, n. 20, 673–675; Comment: *Executive Agreements and the Proposed Constitutional Amendments to the Treaty Power*, 51 Mich. L. Rev. 1202, 1206–1207; Treaties and Executive Agreements, Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 83d Cong., 1st Sess., on S. J. Res. 1, etc., pp. 837, 853–861; Sen. Doc. No. 170, 82d Cong., 2d Sess. (1953), *The Constitution of the United States—Analysis and Interpretation*, edited by Edward S. Corwin, pp. 433 *ff.*; cf. *Watts* v. *United States*, 1 Wash. Ter. 288, 294.

mechanism the United States can employ to attain international agreement.

a. In the vocabulary of the members of the Constitutional Convention, the term "treaty" did not cover every type of arrangement with a foreign nation. The very text of the Constitution proves this. Art. I, Sec. 10, carefully distinguishes between a "Treaty, Alliance and Confederation" which the States are absolutely prohibited from entering, and an "Agreement or Compact with another State, or with a foreign Power" which the States can make only with the consent of Congress. The draftsmen of the Constitution obviously made a distinction between treaties and compacts;[18] and since the records of debates of the Convention are silent on this point, the terms "treaty" and "agreement" or "compact" must have had distinct connotations to the meticulous members of the Convention.[19] Apparently, they were aware of the distinction made between treaties and less formal agreements in contemporary international law as evidenced by the writings of Vattel, whose teachings exerted a profound influence upon American statesmen and lawyers during the revolutionary

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[18] *Cf.* Taney, C. J., in *Holmes v. Jennison*, 14 Pet. 540, 571–572 (on the Compact Clause): "But the question does not rest upon the prohibition to enter into a treaty. In the very next clause of the constitution the states are forbidden to enter into any 'agreement' or 'compact' with a foreign nation: and as these words could not have been idly or superfluously used by the framers of the constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive."

[19] Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts?"*, 3 University of Chicago L. Rev. 453, 457.

period and virtually the first hundred years of the Republic.[20]

Vattel distinguishes between treaties which are "entered into by sovereigns for the welfare of the State, either in perpetuity or for a considerable length of time," and "agreements, conventions [or] arrangements" "which have for the object matters of temporary interest."[21] It is significant that two of the earliest interpretations of the Compact Clause refer to these portions of Vattel in order to explain the distinc-

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[20] Nussbaum, *A Concise History of the Law of Nations* (Rev. Ed.), p. 161, 162; Butler, *The Treaty-Making Power of the United States*, Vol. 1, Sec. 152; Weinfeld, *ibid.*, at 458 *ff.* Lapradelle, Emer de Vattel in 3 Vattel, *The Law of Nations* (Carnegie ed.) xxix-xxxx. Levitan, *Executive Agreements*, 35 Ill. Law Review 365, 366-370. Thus, when the publisher of Vattel's *Laws of Nations* sent Benjamin Franklin three copies of the book in 1775, Franklin answered: "I am much obliged by the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising State make it necessary frequently to consult the law of nations." 2 Wharton, *Revolutionary Correspondence*, 64. Vattel was cited in the first reported decision of a federal court, *The Resolution*, 2 Dall. 1, 15 (Federal Court of Appeals) (1781), and by both sides in *Respublica* v. *De Longchamps*, 1 Dall. 110, 112 (Oyer & Terminer, Philadelphia, 1784). James Wilson, "esteemed as the most learned lawyer of his generation" (Reeves, *The Influence of the Law of Nature upon the International Law of the United States*, 3 Am. Journ. of Int. Law, 546, 552-553), was counsel in both cases. And see his reference to Vattel in the Pennsylvania Convention called to ratify the Federal Constitution, 2 Elliott, *Debates*, 454; Vattel was also cited to the South Carolina Convention, 4 Elliott, *Debates*, 277-278, 310. The first draft of the Constitution which distinguished between Treaties and Agreements was written in Wilson's handwriting. 2 Farrand, *Records of the Federal Convention* 163, 169.

[21] Vattel, *The Law of Nations* (Carnegie ed.), Vol. III, p. 160; Weinfeld, *ibid.*, at 460.

tion between "treaties" and "agreements" or compacts.[22]

From Vattel and like publicists, the framers of the Constitution must have known that, in international usage, the term "treaty" does not cover all agreements with foreign nations. And by limiting the requirements of senatorial advice and consent to "treaties,"[23] they left undisturbed the power of the President, as the Nation's sole organ in the field of foreign rela-

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[22] Tucker, *Blackstone's Commentaries*, Vol. I, App. pp. 309, 310 (1803), and Chief Justice Taney in *Holmes v. Jennison*, 14 Pet. 540, 572. Mr. Tucker, a contemporary of the members of the Constitutional Convention (Weinfeld, *ibid.*, at 461), paraphrased Vattel in defining treaties as referring to "subjects of great national magnitude and importance * * * often perpetual or made for a considerable period of time. Mr. Justice Story, while feeling that this formula was at best a very loose and unsatisfactory exposition (2 Story, *Commentaries on the Constitution of the United States*, Section 1402), suggested that the term "treaties" applied to "treaties of a political character," while "compacts and agreements" "might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land, situated in the territory of each other; and other internal regulations for the mutual comfort and convenience of states, bordering on each other" (*ibid.*, Section 1403). Compare the concept of International Administrative Law coined by L. v. Stein, *Einige Bemerkungen über das Internationale Verwaltungsrecht*, 6 Schmoller's *Jahrbuch fur Gesetzgebung etc.* (1881), 395, 430 *ff.* While Vattel's formulation of the distinction between treaties and other agreements may have been imperfect and groping, it evidences the recognition, by the middle of the 18th century, that a new, informal type of international arrangement had come into being.

[23] It will be noted that Hamilton's draft constitution (*supra*, pp. 55a–56a) required senatorial advice and consent for "all treaties, conventions and *agreements*." 3 Farrand, *Records of the Federal Convention*, 624–625 (emphasis added).

tions, to enter into agreements of lesser importance, shorter duration, or different character.[24]

b. Congress and the Executive have recognized since the earliest days of the Republic that the foreign relations of the United States are not to be conducted exclusively by treaty. As early as 1792, the Post Office Act authorized the Postmaster General to "make arrangements with postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the postoffices."[25] These were not treaties in the constitutional sense. If they had been, Congressional authorization would be of no avail to the President in the absence of the advice and consent of two-thirds of the Senators present.

Ever since the first decade under the Constitution, the President has entered into a large number of executive agreements, many with and many without

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[24] The records of the Constitutional Convention indicate that when its members were referring to "treaties" they were thinking primarily of peace treaties and other treaties vitally affecting the fundamental interests of the Nation or of the States, such as their territorial integrity, or fishing and navigation rights, which were all-important in the 18th century. Farrand, *Records of the Federal Convention*, Vol. II, pp. 297–298, 540–543, Vol. IV (Rev. ed., 1937), p. 58; see also the informative letter of Mr. Williamson to James Madison, *ibid.*, Vol. III, p. 306–307; Warren, *The Making of the Constitution*, pp. 653–658; Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 George Washington University Law Review 271, and Mr. Warren's testimony in Hearings before Subcommittee No. 3 of the Committee on the Judiciary, etc., House of Representatives, 78th Cong., 2d Sess., on H. J. Res. 6, etc., Serial No. 21, pp. 79–88.

[25] Sec. 26, 1 Stat. 232, 239. The Congressional debate discloses that the Second Congress was in no mood to enhance the power of the Executive. Cf. *Annals of Congress*, 2d Congress, cols. 230–236, 238–241.

the consent of Congress.[26] Agreements made under Congressional or Senatorial authorization, or later ratified or confirmed, have included a variety of subjects, *e. g.*, reciprocal trade, lend-lease, civil air routes and services, double taxation, importation of agricultural workers, etc.[27] Those made without legislative consent or authorization have been of several types and with many nations. They have also covered many subjects, from the most trivial matters of diplomatic ceremony to more important arrangements of commercial or military consequence. "Among these are such as apply to minor territorial adjustments, boundary rectifications, the policing of boundaries, the regulation of fishing rights; private pecuniary claims against another government or its nationals, in Story's words, 'the mere private rights of sovereignty.'"[28] There have also been understandings as to the passage of troops, and commercial matters, including arrangements as to imports and exports and customs reciprocity.[29] For example, the 1907 "Gentlemen's Agreement" with Japan, pursuant to which Japan agreed not to issue any passports to its citizens for immigra-

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[26] For their description and enumeration, see the authorities cited fn. 15, pp. 59a–60a, *supra*, and fns. 27, 36, *infra*. Moore's 1905 article is the early classic in this field.

[27] See a memorandum prepared by the Department of State in 1953, and reprinted in Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 83rd Cong., 1st Sess., on S. J. Res. 1 and S. J. Res. 43 ("Treaties and Executive Agreements") (February, March, April 1953), at pp. 853 *ff.*

[28] Sen. Doc. No. 170, 82d Cong., 2d Sess. (1953), *The Constitution of the United States of America—Analysis and Interpretation*, edited by Edward S. Corwin, at p. 433, see also fn. 22, *supra*, p. 62a.

[29] See Sayre, *The Constitutionality of the Trade Agreements Act*, 39 Col. L. Rev. 751, especially the Appendix at 770–775.

tion to the United States, was a Presidential arrangement. Cf. Willoughby, *The Constitutional Law of the United States* (2d ed.), Vol. I, Section 287.

Many of these agreements may be said to have some sanction in powers expressly conferred on the President by the Constitution, such as his power as Commander-in-Chief[30] or his authority to receive foreign ambassadors.[31] However, a large and extremely important portion of them such as certain types of commercial agreements, boundary arrangements, and the settlement of claims,[32] do not find any express basis in the Constitution and rest exclusively on the President's general power over foreign relations. And even those agreements which can be tied to a specific executive power find their main support in the President's position as the country's representative in foreign affairs. For instance, the Litvinov Assignment, with its significant debt arrangement, does not stand simply on the constitutional provision that the President "shall receive Ambassadors

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[30] *E. g.*, Armistices and other military arrangements; *cf.* Moore, *Treaties and Executive Agreements*, 20 Political Science Quarterly 385, 390-392; Crandall, *Treaties, Their Making and Enforcement* (2d ed.), Sec. 56.

[31] Cf. the Litvinov Assignment, the validity of which was upheld in *United States* v. *Belmont*, 301 U. S. 324, and *United States* v. *Pink*, 315 U. S. 203.

[32] In *United States* v. *Pink*, 315 U. S. 203, 240, the concurring opinion of Mr. Justice Frankfurter stated: "That the President's control of foreign relations includes the settlement of claims is indisputable. * * * The President's power to negotiate such a settlement is the same whether it is an isolated transaction between this country and a friendly nation, or is part of a complicated negotiation to restore normal relations, as was the case with Russia." See also *Monaco* v. *Mississippi*, 292 U. S. 313, 331; Moore, *Treaties and Executive Agreements*, 20 Political Science Quarterly 385, 403-408.

and other public Ministers" (Art. II, Sec. 3). See *United States* v. *Pink*, 315 U. S. 203, 229–230, 240. The historical fact is that the President's general foreign affairs power, rather than some special or limited provision of the Constitution, supplies an important basis for many arrangements he has made in the last century and a half.[33]

There thus exists a usage, going back to the earliest years of the country, that not all the dealings of the United States with foreign nations have to take the form of treaties and that the President may enter into many types of arrangements in his capacity as the sole organ of the Nation in the field of foreign relations. This constitutional usage, on the basis of which the United States has entered into many scores of Presidential agreements, is indicative of the scope of the President's power. *Ex parte Quirin*, 317 U. S. 1, 42; *Inland Waterways* v. *Young*, 309 U. S. 517; *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 473; *Field* v. *Clark*, 143 U. S. 649, 691.

c. Though this Court has not often had the opportunity to consider executive agreements, it has affirmatively held that the category of "treaty" does not exhaust our arrangements with foreign powers and that the President may conclude executive agreements which are not treaties. In *Altman & Co.* v. *United States*, 224 U. S. 583, 601, the Court confirmed the existence of agreements not "possessing the dignity of one requiring ratification by the Senate." In *Monaco* v. *Mississippi*, 292 U. S. 313, 331, it pointed out that the adjustment of claims need not necessarily

[33] Others, of course, are based upon specific authorizations to the Executive contained in statutes or treaties, *e. g.*, tariff concession agreements are authorized by Section 350 of the Tariff Act of 1930, as amended, 19 U. S. C. 1351.

take the form of treaties. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318, unequivocally stated that the foreign relations power of the United States included the authority "to make such international agreements as do not constitute treaties in the constitutional sense." *United States* v. *Belmont*, 301 U. S. 324, 330–331, and *United States* v. *Pink*, 315 U. S. 203, 229–230, likewise upheld the President's power to enter into executive agreements without senatorial participation.[34]

Specifically, an executive agreement entered into by the President pursuant to statutory authority has been held by this Court to have the same status as a treaty for the purpose of applying legislation relating to appeals to this Court (*Altman & Co.* v. *United States*, 224 U. S. 583), and it has been held that the President had power to make, without statutory authorization or Senate participation, the Litvinov Assignment incident to the recognition of the Soviet Union. *United States* v. *Belmont*, 301 U. S. 324, 331–332; *United States* v. *Pink*, 315 U. S. 203, 230.

As in the case of treaties, executive agreements can be modified or overridden, for domestic purposes, by subsequent legislation. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 720; *Moser* v. *United States*, 341 U. S. 41, 45. And like all other governmental power in the United States, this "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations * * * must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320. Together with statutes and treaties, executive

[34] See also *Ozanic* v. *United States*, 188 F. 2d 228, 231 (C. A. 2); *Etlinger S. A.* v. *United States*, 123 C. Cls. 552, 572.

agreements are subject to the Bill of Rights and the other clauses of the Constitution[35] which protect all Americans from the excesses of official authority. See *Reid* v. *Covert*, No. 701, Oct. Term 1955, decided June 10, 1957, slip op., pp. 14–17 (opinion of Mr. Justice Black).[36]

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[35] In *United States* v. *Belmont*, 301 U. S. 324, 332, and *United States* v. *Pink*, 315 U. S. 203, 226, the Court assumed that an executive agreement may not violate the Fifth Amendment.

[36] Past practice indicates that international agreements have been cast in the form of treaties or executive agreements, depending upon a number of variables, such as their importance, duration, subject matter, and the degree to which the United States enters into binding commitments. (See 39 Op. A. G. 484, 487.) Like most decisions on the distribution of functions between branches of government, the determination of the matters appropriate for an executive agreement calls for informed "political judgment" and does not lend itself to an exact formula. Cf. George Sutherland, *Constitutional Powers and World Affairs*, 121; Arthur E. Sutherland, *Restricting the Treaty Power*, 65 Harv. L. Rev. 1305, 1324, 1329, and the authorities there cited. Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, fn. 37, point out that the classification of treaties and compacts under Art. I, Section 3, of the Constitution is based at least in part upon "political judgment." As former Assistant Secretary of State Sayre has said (Sayre, *The Constitutionality of the Trade Agreements Act*, (1939), 39 Col. L. Rev. 751, 755):

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.

Foreign countries seem to apply similar tests. Lauterpacht's Oppenheim, *International Law* (8th ed.), Vol. I, Sec. 512;

McNair, *The Law of Treaties*, p. 86; Laband, *Staatsrecht des Deutschen Reichs* (5th ed.), Vol. II, 153–155. Art. 59 (2) of the Constitution of German Federal (Bonn) Republic, expressly provides for "administrative" agreements (Verwaltungsabkommen). The Austrian and Italian Constitutions (Arts. 50 and 80, respectively) require legislative consent to treaties which are of a political nature. The Swiss practice is strikingly similar to the American. See Fleiner-Giacommetti, *Schweizerisches Bundesstaatsrecht*, 825–829.

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October Term, 1956

No. 1103

WILLIAM S. GIRARD,
Petitioner-Appellee,

v.

CHARLES E. WILSON, ET AL.,
Respondents-Appellants.

BRIEF FOR APPELLEE AND APPENDIX

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IN THE

Supreme Court of the United States

October Term, 1956

No. 1103

WILLIAM S. GIRARD,
Petitioner-Appellee,

v.

CHARLES E. WILSON, *et al.*,
Respondents-Appellants.

BRIEF FOR APPELLEE AND APPENDIX

Facts and Resume of Litigation

Petitioner-Appellee is a citizen of the United States serving with the United States Armed Forces in Japan. For several months past he has been held in custody by the United States Military Authorities at Camp Whittington in the vicinity of Tokyo, for the purpose of being delivered to the Japanese government to stand trial before a Japanese Court for an offense allegedly in violation of Japanese law.

On February 7, 1957, Petitioner's Commanding Officer certified as follows:

> "Girard, William S., RA 16 452 809, Specialist Third Class, Company F., 8th Cavalry Regiment, APO 201, was in the performance of his official duty at 1350 hours, 30 January 1957, Camp Weir Range Area, when he was involved in the following incident: On 30 January 1957, 2nd Battalion, 8th Cavalry Regiment, was engaged in routine training at Camp Weir Range Area. Company F was conducting blank firing exercises. Specialist Third

> Class William S. Girard was instructed by his platoon leader to move near a position near an unguarded machine gun to guard the machine gun and items of field equipment that were in the immediate area. Girard, following instructions, moved to the designated position near the machine gun. While performing his duties as guard, he fired an expended cartridge case, as a warning, which struck and killed Sakai, Naka, Kami-Shinden, Somamura, Gunma Prefecture, who had entered the range area for the purpose of gathering expended cartridge cases."

On June 4, 1957, a joint statement was issued by the Secretary of State and the Secretary of Defense wherein they say, among other things, that pursuant to a "treaty and agreement" and pursuant to "treaty arrangements", a "United States representative" agreed to deliver Girard to the Japanese government for trial and "in view of this completed action, attempting to prolong the dispute over the jurisdictional issue would create a situation which could basically affect United States relations not only with Japan, but also with other nations"—therefore, as far as these two high officials of the Executive Department of this government were concerned, they approved what was done as a *fait accompli*. Like Pontius Pilate they washed their hands.

On June 6, 1957, an Order to show cause why a writ of habeas corpus should not issue, containing a stay pending hearing, was signed by Honorable Joseph C. McGarraghy, Judge of the United States District Court for the District of Columbia. On June 11, 1957, at the hearing before the District Court, the Government admitted and stipulated upon the record that the offense, for which the Japanese government was seeking to try petitioner, arose out of an act or omission in the performance of his official duty and that petitioner was being held for surrender to the Japanese government for trial as directed and announced in the joint statement of Secretaries Dulles and Wilson.

Respondents-Appellants' Return and Answer to the order to show cause alleges, "The decision by the United States not to exercise jurisdiction in this case is a discretionary decision of the Executive Branch in the conduct of foreign affairs and the military defense of the United States, and as such *is a political decision not subject to judicial review.* There has been no abuse of discretion" (Par. 7).

The Return and Answer further alleges that there were certain agreements and arrangements between the United States and Japan pursuant to which discretionary power was vested in the Executive Branch of the United States government to deliver Petitioner to Japan for trial and that the decision so made was not subject to judicial review (Pars. 3, 4 and 7).

Petitioner's reply to the Return and Answer denies the existence of the discretionary power, denies the existence of any valid treaty between the United States and Japan, denies that any offense against the Japanese law had been committed, denies that the named Respondents or anyone else may deprive Petitioner of his constitutional rights, and affirmatively asserts that the detention of the Petitioner for delivery to a foreign government is illegal and unconstitutional.

The District Court made a ruling during the hearing, predicated upon the admissions and stipulations of counsel for the Respondents in open court, that no issue of fact was raised; that only issues of law were involved; and that if was not necessary to produce Petitioner at the hearing as would otherwise have been required by the provisions of Title 28 U. S. Code 2243.

On June 17th, a document entitled "Motion to Expedite Determination", to which was attached an affidavit of the Secretary of State, was filed with the District Court. This affidavit, unlike the earlier one submitted in support of a motion to quash subpoena and in some respects, contra-

dictory thereto, recites that the "conclusion" which he and the Secretary of Defense had reached and announced in their joint statement, "was discussed with and confirmed by the President"—thereby placing full responsibility for any possible wrongdoing on the President himself.

On June 18th the Opinion of the District Judge was filed and an Order was entered thereon enjoining the Respondents from delivering Petitioner to the Japanese government. Appeal from said Order was taken by the Respondents-Appellants to the Court of Appeals for the District of Columbia Circuit. Cross-appeal from so much of the Order as denies the Writ of Habeas Corpus and discharges the order to show cause was taken by the Petitioner-Appellee. Prior to judgment and pursuant to the provisions of Section 1254(1) Title 28 of the U. S. Code, petitions for a Writ of Certiorari were filed by both sides with this Honorable Court. On June 21, 1957, both petitions were granted. The cases were consolidated and assigned for argument on Monday, July 8, 1957. A separate brief on the cross-appeal by Petitioner under No. 1108, October, 1956 Term, has been filed with this Court on July 1, 1957.

Preliminary Argument

The issues on this appeal probe deeply into fundamental principles and basic concepts of constitutional law concerning the proper exercise of power by the Executive, the limitations upon such power, and the authority of the Executive to alienate or infringe upon the constitutional rights of the citizen. Also involved is the legality of the attempted usurpation of power by the Executive and his encroachment upon the constitutional functions of the Legislative and Judicial branches of this government.

The contention that the Executive may make a discretionary political determination to confer jurisdiction in a

criminal case, in disregard of the deep-rooted maxim that this is a government of laws and not of men, is so unprecedented as to be inconceivable. Were it to be embraced as the new and modern rule, then our entire concept of constitutional government and the rights of the individual must be completely overhauled and revamped. So dangerous would be a precedent that the Executive has unreined discretionary power to confer criminal jurisdiction and so vast are its implications, that it could well be a proverbial "dragon's-tooth" which could spring forth irrepressibly to further encroach upon rights heretofore held inviolate. On this appeal, the person of soldier Girard is directly involved, but the precedent here established may well chart the course on which our ship of state will sail—for better or for worse.

The Self Investiture of Executive Power to Confer Criminal Jurisdiction, the Steps Taken to Acquire it, and Comments as to its Illegality

Simultaneous with the signing of the Treaty of Peace on September 8, 1951, a Security Treaty was entered into between the United States and Japan. It consists of five paragraphs. It recites that *at the request of Japan and for its defense*, the United States agrees to maintain certain of its Armed Forces in Japan. Article 3 reads: "The condition which shall govern the *disposition of Armed Forces* of the United States of America in and about Japan shall be determined by administrative agreements between the two governments". (Italics supplied.)

The words "disposition" as generally understood and as defined in all dictionaries means arrangement, allocation, placement, employment, user, etc. Nowhere is it defined to include "status" or other meanings which the appellants attribute to it.

Relying on the wording of Article 3 of the Security Pact, "an Administrative Agreement" was entered into on

February 28, 1952 wherein it was provided, among other things, that the United States shall have exclusive criminal jurisdiction over all offenses which may be committed in Japan by members of the Armed Forces, the civilian component thereof and over certain dependents (Article XVII). It was further provided that at a later date the United States would conclude with Japan, at the option of Japan, another agreement on criminal jurisdiction similar to the NATO Status of Forces Agreement.

On or about September 29, 1953, Mr. Allison, acting on behalf of the United States, entered into a so-called "Protocol to amend Article XVII of the Administrative Agreement of February 28, 1952" and thereby sought to change entirely (not amend) the earlier provisions respecting the exclusive criminal jurisdiction which the United States was exercising over its Armed Forces in Japan.

A Protocol is defined in the dictionary as an original draft or a word used in diplomatic parlance as a "preliminary memorandum, as of resolutions arrived at in negotiations, often signed by the negotiators, as a basis for a final convention or treaty."

There is nothing in the Security Treaty of September 8, 1951 or the Administrative Agreement of February 28, 1952, which permits or authorizes Mr. Allison or any other person acting on behalf of the United States to whittle away or surrender jurisdiction which the United States was then exercising over its military forces in Japan.

There is a statement in Article XVII of the Administrative Agreement to the effect that the United States will conclude with Japan an agreement on criminal jurisdiction similar to the NATO Status of Forces Treaty, but the fact remains that no such agreement was ever entered into. The Protocol was merely the preliminary negotiations, and the advice and consent of the United States Senate was neither sought nor obtained in order to finalize it into a Treaty. The fact is that the Senate of the United States

made a specific reservation, when consenting to ratification of the NATO Status of Forces Treaty to the effect that it was not to be a precedent for future agreements of similar nature. The Executive disregarded this mandate entirely and continued to make similar agreements with other countries including Japan, pursuant to which agreements the constitutional rights of American servicemen were and are being torn away.

When consenting to the NATO Treaties, which included the agreement concerning criminal jurisdiction, the Senate reservation directed that there should be no surrender of jurisdiction in any case where the constitutional rights of the accused may be diminished, denied or destroyed (T.I.A.S. 2846). These were direct mandates of the Senate of the United States, which body is charged under the Constitution, with the duty of advising and consenting to treaty contracts. Only in the case of the NATO nations was the Senate willing to partially relinquish criminal jurisdiction over our Armed Forces. It is doubtful, however, if they had the constitutional authority to relinquish any jurisdiction, with or without the reservations (U. S. Constitution Article 1, Section 8, Cl. 14; *Ex Parte Quirin*, 317 U. S. 1).

In any event, the Senate's action in *conferring* jurisdiction over "off duty offenses" to visited NATO countries indicates its understanding of international law that our Army was not subject to the jurisdiction of the foreign nation. Had jurisdiction existed in the foreign country, as the Appellants here contend, there would have been no need to *confer* jurisdiction. The argument that under international law a visiting force is subject to the jurisdiction of the nation in which it is stationed, is erroneous. That is not the law and it is on this false premise, as well as others, that the Appellants have built their case and seek to justify their action.

The Protocol of September 29, 1953, which the government contends constituted a "law" binding on American

citizens, is in disregard of the Senate's reservations. Aside from its unconstitutionality (a subject hereinafter discussed), said Protocol has no legal validity (1) because it is not an agreement but merely a statement of preliminary negotiations; (2) because the negotiator, who signed on behalf of the United States, exceeded authority which was purportedly contained in Article XVII of the Administrative Agreement of February 28, 1952 and (3) because the Protocol was not authorized, approved or consented to by the United States Senate and is directly contrary to the Senates express mandate.

For the purpose of the argument which follows and for no other, the Petitioner-Appellee will assume that the Protocol of September 29, 1953 may be viewed as a valid agreement. It granted to Japan certain criminal jurisdiction with the express reservation that "the military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces and the civilian component in relation to (i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent; (ii) *offenses arising out of any act or omission done in the performance of official duty.*" It further provided that if the state having the primary right decides not to exercise jurisdiction, notice thereof shall be given to the authorities of the other State as soon as practical in which event the "authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

As part of the Protocol there are certain "agreed official minutes regarding Protocol to amend Article XVII of the Administrative Agreement". It appears that the negotia-

tors sought to incorporate them by reference. These "agreed official minutes" make provision as follows: "Where a member of the United States armed forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that the alleged offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings be sufficient evidence of the fact unless the contrary is proved."

Under the Government's theory of this case these so-called "agreed official minutes" also became "law"—an illusive law, however, which the Executive may set aside at will. When set aside, the will or dictates of the Executive became the "law".

When all the above enumerated documents were signed, sealed and delivered, there was still lacking provision for the exercise of Executive will and there was no provision requiring or permitting the Executive to deliver an American national to another nation for trial. Nor was any machinery or procedure established for transfer of the citizen, such as is normally contained in extradition treaties. Accordingly, the negotiators moved onto the fifth step of this bootstrap-lifting operation to invent more power.

A new and novel source of law was evolved. It is called "Agreed Views" published in A.F.F.E. pamphlet 27-1. It is the alleged function of the "Agreed Views" to interpret the several loosely drawn documents to which reference is hereinabove made—an obvious Executive usurpation of the function of our judiciary. "Agreed Views" was then followed by a sixth step—the issuance of a unilateral circular entitled "U. S. Army Forces, Far East and Eighth U. S. Army (*Rear*), Circular 22-1, dated January 24, 1956". This "circular" and "Agreed Views" are now looked to as some sort of legislation or new kind of international agreement. Its purpose is to permit fulfillment of earlier

alleged agreements designed to create authority in the Executive to act as the absolute monarch in matters of criminal jurisdiction affecting American servicemen overseas. Now, before this Honorable Court, counsel for the government go one step further. They say that the President's conduct in these matters is not subject to judicial review. The old "divine right of Kings" is heard once more with its hollow echo that the "King can do no wrong."

All the acts performed and the documents executed, the Government asserts, (1) were authorized by the words "disposition of Armed Forces" contained in Article III of the Security Treaty made on September 8, 1951; (2) have the binding force of law; (3) empowered and authorized the President of the United States and his subordinates to hand Girard over to the Japanese government for trial; (4) prevents Girard from complaining because he, like everybody else, is presumed to know the law and the effect of these documents (although neither he nor anyone else ever heard of all of them); (5) places Executive decisions respecting criminal jurisdiction outside the realm of judicial review; and lastly, (6) permits and authorizes the taking of Constitutional rights from Girard, the American soldier who is sworn to give up his life, if need be, to defend that very Constitution. We can only characterize these views of the Government as utter nonsense!

The Decision to Surrender Girard to the Japanese Government for Trial

At the hearing before the sub-committee of the Committee on Armed Services, United States Senate, in the case of William S. Girard, held on June 5, 1957, the committee members expressed grave doubt as to the validity and constitutionality of the whole series of acts to which reference is hereinabove made, and as well to the action taken to surrender jurisdiction. Similar doubts and cri-

ism were expressed by many Senators and Congressmen in other hearings to which reference is hereinafter made.

At the June 5, 1957 hearing, it was disclosed that the United States had made a purely "political decision" to turn Girard over to the Japanese authorities for trial and that it was done because of public clamor in Japan. It was revealed further that the American representative in Japan maintained throughout the negotiations with the Japanese government that the United States was right on the law and the facts; that Girard's act was done in the course of assigned military duty and that even under the agreement upon which Japan was relying, the United States was entitled to exercise jurisdiction. Finally the political decision was made in Washington to give in to the Japanese and our Representative was so instructed. The procedure for making any such determination, as provided in the Administrative Agreement, par. XXVI, was not followed.

It was reported, at the Senate committee hearing of June 5, 1957 that the provisions concerning disputed jurisdiction, contained in the agreement, were so drawn that the final decision, as to who shall exercise jurisdiction, is vested solely in Japan and that we as a nation must do as they say—right or wrong. It was also revealed that the Defense Department made the political decision and not the State Department although the latter did acquiesce in the result. The whole series of illegal acts and the artifice by which the Executive branch sought to create treaty rights and obligations without sanction of the United States Senate, was also revealed at this hearing, as well as in earlier hearings (Appendix VI, p. 30a; Appendix VII).

If jurisdiction in criminal cases may be vested by the exercise of the asserted, nebulous, discretionary power of the Executive department, then we are far removed from the basic concepts of the American form of government. What clause in the Constitution, may we ask, authorizes "discretionary political power" to determine criminal jurisdiction over an American citizen and from whence

does it stem? What are the bounds of such claimed discretionary power? Here it is said to have been exercised to satisfy the public clamor of the Japanese people. But since when is that a legal reason and since when has the backbone of the Executive branch been so weakened that we subrogate the rule of law to convenience and placation? These are the issues in this case and not the irrelevant sideshow implanted by Appellants, in the District Court, to the effect that the Japanese government would be more lenient with our military men who commit offenses than would the United States government—a claim which is not true in any event. It is not leniency which Girard seeks but justice under law and within the rules of law as we know them and not as the Japanese would interpret them for us.

Apropos, are the words of the Supreme Court of the United States in the recent case of *Reid* v. *Covert* (701 and 713, October Term, 1956). The quotation from Lord Coke, made centuries ago, comes as a refreshing inspiration in the present day, when a government of the people openly states that it sacrificed one of its citizens for convenience and that it has the unfettered discretionary power to do so. "God send me never", said Lord Coke, "to live, under the Law of Convenience or Discretion".

In the *Reid* case, *supra*, this Honorable Court condemned, as unconstitutional, an international treaty designed to confer criminal jurisdiction over American citizens in a foreign land. Mr. Justice Black said: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land".

The Offense Arose Out of An Act Done in Performance of Official Duty and, for this Additional Reason, is Not Subject to Japanese Jurisdiction

Aside from the unconstitutionality and illegality of the several documents upon which Appellants rely as their source of authority to transfer the body of Girard to the Japanese government for trial, an examination of the text of the documents reveals that the claimed authority is non-existent and the Respondents are accordingly without power to act.

Assuming the documents to be legal, it appears that the Administrative Agreement of February 28, 1952; the "Protocol of September 29, 1953"; the "Official Minutes to the Protocol"; the "Agreed Views", etc., were all designed to retain primary jurisdiction in the United States for "on duty offenses". Japan agreed that the United States shall have the right to exercise primary jurisdiction over the members of its Armed Forces if the offense arose out of any act or omission done in performance of official duty. Japan also agreed that when a member of the United States Armed Forces is charged with an offense, a certificate by his commanding officer stating that the act arose out of the performance of official duty shall "in any judicial proceedings be sufficient evidence of the fact unless the contrary is proved." Japan further agreed that each state would give "sympathetic consideration" to a request for a waiver of primary jurisdiction but there never was any agreement that such waiver had to be given as Japan insisted. Furthermore there is no law or rule, nor is there any document or treaty which authorizes or directs the Executive to grant a waiver or to accede to Japan's request. Accordingly, it may not be done (*Valentine* v. *United States*, 299 U. S. 5). The government officials advised the Senate, when seeking its consent, that in the case of a guard shooting someone while on Guard Duty, the United States would have exclusive jurisdiction (Appendix II, p. 5a). Now they take the opposite view in order to create a scapegoat to satisfy Japanese public clamor. The right is in the President, they say, to sacrifice a citizen and that right stems

from his powers, as the Chief Executive (appellant's brief, p. 18).

Contrary to the contention of Respondents-Appellants and appellant Dulles in particular, that we would be breaching our agreement with Japan if we do not surrender Girard to that government for trial, it is, in fact, the Japanese government which is breaching the agreement by its assertion of rights which, under the Administrative Agreement and the Protocol, it did not have.

In this case Girard's commanding officer certified that he was acting in the performance of official duty and that the offense complained of arose out of the performance of that duty. These facts were likewise stipulated by counsel for the Respondents-Appellants at the hearing before the District Court. It is undisputed that Girard was on guard duty and assigned to protect United States property in a military area and that there were posters warning trespassers away from the premises. The warning signs read substantially as follows: "Stop. You are violating the Joint Administrative Agreement between the United States and Japan by entering this area. Offenders will be apprehended and taken to the Japanese Police for prosecution in accordance with this agreement". It is undisputed also that the deceased trespassed on to a United States Military Reservation for the purpose of taking property which belonged to the United States and that for the purpose of scaring her and others away, an expended cartridge case was fired, as a warning.

Under the Administrative Agreement and Protocol, as well as under international law and the laws of the United States, the act giving rise to the offense, is one over which the United States has exclusive jurisdiction, and the Executive may not waive it. Japan was arbitrary in asserting rights which, under law and under the agreements, it did not have and is therefore without cause to complain.

The purported power and authority, which the Executive Department has ostensibly enveloped unto itself, is violative of the express provisions of the United States Con-

stitution and is a usurpation of functions allocated to the other branches of this government. Being illegal the exercise of the asserted power has been properly restrained. *Ex Parte Orozco*, 201 F. 106. In the constitutional scheme of things, it is for the courts and this Honorable Court in particular, to compel the President to act within constitutional limitations. *Youngstown* v. *Sawyer*, 343 U. S. 579.

POINT I

The administrative agreement and all documents allegedly executed thereunder are unconstitutional and any action taken by the executive branch of the government under authority of said documents is illegal and void.

The Constitution of the United States provides, among other things, that the power is in Congress "to make rules for the government and regulation of the land and naval forces" (Art. I, Sec. 8, Cl. 14); that the power of the President is to execute the laws—not to make them (Art. II, Sec. 1, Cl. 1)—and "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur;" (Art. II, Sec. 2, Cl. 2); that there must be equal protection of the laws (Amend. 14, Sec. 1), a rule which is applicable to the Federal as well as the State Governments (*United States* v. *Yount*, 267 F. 861), and that all persons charged with an offense must be afforded due process of law (Amends. 5, 6 and 14). The Constitution provides further that the judicial power of the United States (which includes the interpretation of treaties or executive agreements, *Z. & F. Assets Realization Corp.* v. *Hull*, 114 F. 2d 464, aff'd 311 U. S. 632), is vested in the courts (Art. III, Sec. 2).

By reason of the division of powers under the Constitution, all branches of our government may act only in their own defined sphere. *United States* v. *Johnson*, 53 F. Supp. 167, aff'd 175 F. 2d 612. Congress and the President, like

courts, have no power not derived from the Constitution. *Ex parte Quirin, supra.* We pose the direct question which is the major issue in this case: on what section of the Constitution does the government rely, as its source of authority to determine criminal jurisdiction over the men in our armed forces and from where does it obtain authority to waive the court-martial jurisdiction which was established by Congress?

The Executive branch of the government was never vested with power to make laws or agreements to confer or withhold criminal jurisdiction. Where does that authority come from now? Treaties and executive agreements like any other contract or statute are finally construed by the courts, not by the executive. *Leavenworth L. & G. R. Co. v. United States*, 92 U. S. 733. It is the court's determination which is binding and any political decision as to meaning or interpretation of a treaty or contract is not binding on the judiciary. *Sullivan v. Kidd*, 254 U. S. 433; *Valentine v. United States, supra.*

An "Administrative Agreement" or a "Protocol" with or without "Minutes" attached, or an expression of "Agreed Views" certainly cannot be considered as law particularly when it deprives a citizen of constitutional rights. *The Cherokee Tobacco*, 78 U. S. 616, 620; *Geofroy v. Riggs*, 133 U. S. 258, 267; *Reid v. Covert, supra.* Even an alien may not be deprived of his legal rights by Executive decree or political decision. *Ex parte Orozco, supra.*

The Administrative Agreement and subordinate documents on which respondents-appellants rely to sustain the claimed Executive authority were not entered into in conformity with the provision of the Constitution. The making of said Agreements was, in fact, a usurpation of power by the Executive and constitutes an invasion of the prerogatives of the Congress and the Senate as declared and defined by the Constitution. This encroachment, if permitted to go unchallenged, constitutes a dangerous precedent under which, at any other time, the Executive may deny a citizen the equal protection of the laws and due process of law.

Many times during the past 175 years, the warning signals, concerning usurpation of power, were posted.* Only recently this Honorable Court, in its courageous and memorable opinion, repeated the same warning (*Reid* v. *Covert, supra*):

> "Slight encroachments create new boundaries from which legions of power can seek new territory to capture." It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. * * * Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny. * * *

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* In his immortal farewell address, President Washington with sound judgment and profound insight, discussed the separation of the powers of government in the following statement:

> "It is important, likewise, that the habits of thinking in a free country should inspire caution in those entrusted with its administration, to confine themselves within their respective Constitutional spheres; avoiding in the exercise of the Powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one and thus to create whatever the form of government, a real despotism. * * * If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

While not necessary to a determination of this case, it is the appellee's contention that even had the Administrative Agreement and Protocol been entered into "by and with the advice and consent of the Senate," it nevertheless would have been violative of the United States Constitution.

The power to make rules for the government and regulation of our Armed Forces is exclusively in the Congress. *Dynes* v. *Hoover*, 61 U. S. 65; *Toth* v. *Quarles*, 350 U. S. 11; *McCune* v. *Kilpatrick*, 53 F. Supp. 80 83; *Reid* v. *Covert*, *supra*. This includes the power to define and punish offenses, to determine jurisdiction, modes of procedure, and review. *Grafton* v. *United States*, 206 U. S. 333; *Hiatt* v. *Brown*, 339 U. S. 103. Congress, acting within the prescribed sphere of its constitutional authority enacted the Uniform Code of Military Justice (Act of May 5, 1950) wherein it was provided, among other things, that the "Code shall be applicable in all places" (Article 5); that jurisdiction to try offenders be vested in courts-martial (Article 18); that no member of our Armed forces shall be confined with enemy prisoners or other foreign nationals (Article 12) etc.

Congress having acted in the field reserved to it by the Constitution, the other branches of government are without authority to modify or change such congressional enactment. Nor can the President, or the President and the Senate combined, make change by executive agreement or treaty. *Toth* v. *Quarles*, supra. Such treaty would be an invasion of power reserved to the House of Representatives and the Senate combined, and therefore invalid. *Geofroy* v. *Riggs*, supra; *Holden* v. *Joy*, 84 U. S. 211; *Whitney* v. *Robertson*, 124 U. S. 190; *Reid* v. *Covert*, supra.

Since Congress alone has the power to determine jurisdiction in cases involving the military forces, the President may not make a treaty which denies that power and the Senate may not give sanction thereto. In matters relating

to military jurisdiction and Rules for the government of our armed forces, the Senate may act only in conjunction with the House of Representatives (U. S. Const., Art. I, Sec. 8, cl. 14)—and then only within the framework of the Constitution.

The language of Mr. Justice Black in *Reid* v. *Covert*, supra, is here particularly appropriate. He said: "It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI [of the Constitution] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V [of the Constitution]. *The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.*

"There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a Treaty. . . ." (Italics supplied.)

In the instant case the President acted without the Senate. Through subordinates he took it upon himself to make the laws for the government of the Armed Forces. His first act was a so-called "Administrative Agreement" followed by a whole series of maneuvers which it is now claimed constitutes "law". Indeed it is not "law" in common everyday parlance and certainly not law of the type envisioned by the Founding Fathers of this Republic. In a sense the decrees of a dictator or the chief of a savage tribe are law—because they have binding force, but such is not law as we understand it under our constitutional form of government. The government shies away from the word "law" and, by circuitous reasoning, argues that Girard's life may be snuffed out or his liberty taken away by a "political decision not subject to judicial review"—

whatever that means! The only method Appellee knows whereby one may be deprived of life, liberty or property, is by "due process of law"—all chatter and circumlocution to the contrary notwithstanding.

The mess we have gotten into and the vast legal problems which our servicemen, as well as the government officials, must face because of Executive encroachment upon fields outside his domain, are reported at length in the many hearings on the subject had before Congressional Committees. There is also contained in these hearings considerable discussion respecting the unconstitutionality and illegality of the Executive agreements designed to transfer jurisdiction over our Armed Forces to foreign governments. Extracts from these hearings are contained in the appendices hereto attached (Appendices II, III, V, VI, VIII).

Time does not permit of a detailed study and analysis of the far-reaching effect which these agreements have had and will have on the rights of American citizens in almost every country of the world. Some of these agreements are secret. Most of them were never referred to the Senate. Only in the case of the NATO nations was Senate approval sought several years after the event. The Senate approved with reservations on the occasion when the Status of Forces Agreements were submitted to it as part of the overall NATO treaty (Appendices III, VI).

In the case of Japan the consent of the Senate was neither sought or obtained. Constitutional requirements have obviously been violated and many Senators have condemned the agreement with Japan and others as unconstitutional. United States Senator, John W. Bricker, went so far as to infer that several government witnesses appearing before Congressional Committees were giving false and misleading information on both law and fact (Appendix VI). He said that some of the arguments advanced in support of the agreements were "fantastic"; that the making of the "secret" agreements as well as the others designed to transfer jurisdiction was a flagrant

violation of constitutional power vested in Congress; that in some of these agreements diplomatic immunity in varying degrees was given to officials of our government along with their staffs, while at the same time immunity of the military man from foreign jurisdiction, which existed from time immemorial, was taken away.

Referring to Japan specifically, Senator Bricker said:

> "Is there a Senator among us who can describe criminal law and procedure as it actually operates in Japan * * *."
>
> "It is not enough merely to look at excerpts from the constitutions and laws of other countries. Many fine phrases are qualified by other provisions effective in national emergencies proclaimed by the authorities. There is not one United States Senator who really knows the type of trial given to persons accused of crimes in all the NATO countries and Japan.
>
> The hearings do not mention how prisoners are treated in NATO countries and in Japan. We know that confinement by our own military authorities takes place under conditions that are humane and sanitary. Will the Senate Foreign Relations Committee certify to the American people that the same conditions prevail in the penal institutions of NATO countries and Japan?
>
> If Americans, by reason of their unique respect for fundamental human rights, are a special or privileged class, they have not shirked their responsibility to people less fortunate. Billions of dollars have, for example, been poured into NATO countries. That contribution would have been impossible without the concept of freedom which distinguishes Americans from other people. Reasonable and honest men may differ in regard to the number of dollars Congress may give away with safety: But to give away the rights of Americans serving in the uniform of their country is unthinkable" (Appendix VI).

The argument is made that these agreements, even the secret ones, are to our advantage; that we must enter

into these pacts with foreign governments in order to maintain bases on their soil; that we cannot backtrack what has already been done; that we may not dishonor our agreements; and in the case of Japan, the United States would be embarrassed if we do not surrender Girard, etc. All these arguments may go well in a political arena or a high-school debate. We are, however, here confronted with legal problems in a judicial forum where the issue is one of law focused directly at the heart of constitutional government. If, as appellee contended, the administrative agreement to surrender jurisdiction, flaunts Constitutional provisions, then it must be declared unconstitutional. Neither Japan nor any other nation may have cause to complain because all nations know and are presumed to know, that no agreement with the United States has any binding force unless made within the limits of power vested by the Constitution in the Executive and the Senate. Just as individuals are presumed to know the law so are nations presumed to know the extent of the treaty making power of the government with which they are negotiating.

VIEWS EXPRESSED BY THE OFFICIALS OF THE GOVERNMENT BEFORE CONGRESSIONAL COMMITTEES: One of the legal advisors for the State Department testified that he could see no difference, legally or otherwise, between an American tourist voluntarily entering the territory of a foreign nation and a soldier drafted into our Armed Forces who was assigned overseas to perform military duty (Appendix II, p. 8a; Appendix III, p. 12a).

Others testified that the Executive branch of this government may enter into secret agreements with foreign powers on the subject of jurisdiction over our Armed Forces and that they could see nothing wrong with it. The secret Yalta agreement made during the war, when possibly it was a wartime precaution, was much criticized but now, in the opinion of some government officials, including the President of the United States, secret agreements are not to be

criticized. But how is the individual soldier to know, on the basis of unpublished secret documents, the nature of the criminal jurisdiction which may be exercised over him? Wherein are secret documents within the framework of the United States Constitution? The record of these Congressional hearings are replete with expressions and views of government officials which have a strange sound to anyone familiar with even the most elementary principles of Constitutional law. Many Senators and Congressmen have characterized all the so-called Status of Forces agreements, as unconstitutional and illegal and indicated their disapproval of the Government's position. (Hearings, Senate Committee on Foreign Relations, April 7th and 8th, 1953; Supplemental Hearings, Senate Committee on Foreign Relations, June 24, 1953; Hearings, House Committee on Foreign Affairs, July 13th, 14th, 20th, 21st, 26th, 1955 and January 31st, February 1st, 2nd, 1956; Hearings, subcommittee Senate Committee on Armed Services, 84th Cong., 1st sess.; ibid., 84th Cong., 2nd sess.; ibid., 85th Cong., 1st sess.; Hearings, House Committee on Foreign Affairs, 84th Cong., 1st sess.)

The government seeks to uphold the legality and constitutionality of these agreements on the theory "that the President had power, as Commander-in-Chief to take such action" (Appendix VI; appellant's brief, p. 48). A similar contention was struck down in *Youngstown v. Sawyer, supra*. In the *Youngstown* case, property was involved. Here life and liberty are involved. Appellants point to the case of *Covert v. Wilson*, 236 F. 2d 732; cert. denied for mootness, 352 U. S. 88. In that case this Honorable Court granted certiorari and directed that the judgment of the Court of Appeals be vacated. In the Court of Appeals the government relied on *In re Ross*, 140 U. S. 453, which case this court recently characterized as a "relic from a different era." Then other cases on which the government there relied were given burial by this Honorable Court in *Reid v. Covert, supra*.

The present day argument that the Executive has unlimited power and authority to take discretionary political action respecting the life and liberty of the men who serve in our Armed Forces in foreign lands (Appendix VII) and that the propriety of such action may not be reviewed by the Courts has overtones of tyranny and it is devoid of merit. *Ex Parte Orozco, supra.*

In this case the Constitution of the United States has been violated, the agreement to surrender Girard to the Japanese government for trial is illegal and this Honorable Court should so declare.

POINT II

An army in the territory of a foreign nation is not subject to the criminal laws of that nation whether it entered by force or by consent.

Under International Law, reaffirmed time and time again by the Courts of this country and by Courts of other nations, the rule is stated that visiting troops in a friendly sovereign's territory are immune from the criminal jurisdiction of the territorial sovereign. *The Exchange*, 11 U. S. 116; *Coleman v. Tennessee*, 97 U. S. 509; *Dow v. Johnson*, 100 U. S. 158; *Tucker v. Alexandroff*, 183 U. S. 424; *Hamilton v. McClaughry*, 136 F. 445; Hyde, *International Law as Interpreted by the United States*, Vol. I, Sec. 247; Archibald King, *Jurisdiction over Friendly Foreign Armed Forces*, 36 A. J. I. L. 539 (1942) and 40 A. J. I. L. 275 (1946); Lauterpacht, *Oppenheim's International Law*, 7th Ed. (1948) Secs. 127, 386, 443, 445; Hackworth, *Digest of International Law*, (1941) Sec. 169; Moore, *Digest of International Law*, Secs. 250, 251; Lawrence, *Principles of International Law*, Secs. 107, 246; Wigmore,

Extraterritorialty of U. S. Armed Forces Abroad, 29 Amer. Bar Assoc. Journal 121; Phillimore, *Commentaries Upon Int. Law*, (3rd Ed.), p. 474; Vattel, *The Law of Nations*, (Fentwick Translation), pp. 274-6; Wheaton, *Elements of International Law*, (1929) Sec. 95; Hall, *International Law*, Sec. 56; *The Gilbert Case*, =1520, *Supreme Court of Brazil* (1944); *Republic of Panama* v. *Schwartzfiger*, 24 Registro Judicial (Panama, 1926) 722; *Casa Blanca* case, Permanent Court of Arbitration at the Hague, 3 A. J. I. L. 755 (1909); *Amrane* v. *John*, 1931-32 Ann. Digest 133, (Div. Tribunal, Alexandria, Egypt); *Dizon* v. *Commanding General*, G. R. No. L-2110, July 22, 1948 (Supreme Court, Philippines); *Wright* v. *Cantrell*, 1943-45 Ann. Digest, (Sup. Ct. New South Wales), 44 New S. Wales Rep. 45 (1943); Manual for Courts-Martial, United States, (1951) Par. 12; Winthrop, *Military Law & Precedents*, 2nd Ed. (1920 reprint) pp. 81-82.

The same principle is taught in the United States Military Academy at West Point. See *Constitutional Powers and Limitations*, pub. by Dept. of Law of the U. S. Military Academy, 1941. It is therein stated:

> " " " all members of the United States Army are subject to the jurisdiction of its court-martial. Yet, while the army is within territorial limits of the United States the civil courts, both Federal and State, have certain *concurrent* jurisdiction over its members " " " However, the jurisdiction of courts-martial becomes *exclusive* when the Army leaves its own territorial limits, as for instance, when the Army marches through a *friendly country* or is stationed therein. *In such cases, consent of the friendly government for exemption from its civil and criminal jurisdiction is assumed as a matter of course; should it deny this consent and act otherwise, it would give rise to serious consequences.*" pp. 109-10. (Italics supplied.)

In *Hamilton* v. *McClaughry*, *supra*, at p. 448, the Court said:

> "Under the well-settled principles of law the offenders so tried [persons in the armed forces of

> the U. S.] were not amenable to the laws of the government of China, and the offenses by them committed, if any, whether by the laws of this country denominated as the crimes of murder, robbery, larceny, or other felony, were not committed in violation of any law of China, because done by persons in the military service of this country while stationed in China."

In *Coleman* v. *Tennessee*, *supra*, at pp. 515, 16, this Honorable Court said:

> "It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. The sovereign is understood, said this court in the celebrated case of *The Exchange* (7 Cranch, 139), to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions: "In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force."

The authorities on International Law and the decided cases are almost unanimous in acceptance and recognition of the above stated rule of law, except Attorney General Brownell and Solicitor General Rankin, both of whom aim to support the President's agreements on the status of forces and Mr. M. L. Schwartz, assistant to Mr. Brownell, who wrote the Department of Justice Memorandum de-

signed to overturn the established rule. (see 53 Columbia Law Review 1091, December 1953).* However much they may desire to change the rule to their own liking, no amount of distortion or fallacious reasoning—regardless of the number of times it is repeated or how loudly it is asserted—can change what has been the established law since time immemorial. The memorandum which they submitted to the Senate Committee on Foreign Relations (Supplementary Hearings held June 24, 1953) is a masterpiece of sophistry designed to misfead and confuse. This is the view of several members of Congress and, if true, we mince no words in condemning it.

The position, that our armed forces fell completely under the yoke of the nation in which they were stationed, was taken in order that it may be asserted that these wholly illegal and originally clandestine administrative agreements, gave us something we did not have before, when, in fact, these agreements are nothing but a shameful surrender of our rights as a sovereign power. A reading of the record of the Congressional Committee hearings will reveal what the truth is. An extract of what was said and the disturbing views, expounded by some of the government witnesses, who appeared before the Congressional Committees, are contained in the Appendices attached.

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* Appellants refer (Appellants' Brief, page 32) to the writers on international law, even those whom this Honorable Court has cited as authority, as only "theorists"—implying that they are not to be relied upon. Recently these Appellants have asked the United States Senate to regard as authority the writings of Mr. M. L. Schwartz. Is he not also a "theorist"—a little less known perhaps? While they characterize as "theorists" world renowned authors whose writings support Appellee, they point to the same authors for legal precedent when their writings appear to support them. Throughout Appellants' brief, these authorities on international law are pointed up as being entirely reliable except the writings wherein they cite the rule that friendly forces in the territory of a foreign nation are not subject to the criminal or civil laws of that nation.

POINT III

Territorial jurisdiction over Camp Weir is in the United States. Under international law and by agreement Japan has granted immunity from exercise of sovereign rights over the area.

Camp Weir, where the offense is alleged to have been committed, is a United States military installation. It fell to the United States and the Condominium of the Allied Powers by virtue of conquest and the unconditional surrender of Japan, at the close of World War II. It has been retained by the United States Military Establishment continuously from April 11, 1946. At that time, the United States and the condominium of powers were exercising sovereign rights over all of Japan. Camp Weir, at the time of the occurrence of the offense on January 30, 1957, was being used solely by the United States Forces. It had been and was at the time a territory which was immune *from the jurisdiction of the government of Japan* (Appendix IX).

Appellants point to the provisions of Chapter I, Article 1 of the September 8, 1951 Treaty of Peace with Japan, under which, the allied powers recognized the sovereignty of the Japanese people over Japan and its territorial waters. However, *simultaneous* with the signing of the Peace Treaty, a Security Pact was entered into between the United States and Japan wherein the United States alone was granted the right of retaining its "land, air and sea forces in and about Japan.". Control over the Camp Weir area was continued in the United States, where the American flag had flown since almost the time of conquest.

Prior to the Peace Treaty, the sovereignty of Japan was, as a matter of International Law, vested in the Condominium of the Allied Powers by virtue of conquest and

unconditional surrender. *Flick* v. *Johnson*, 174 F. 2d 983. This rule of international law was reaffirmed in the judgment of the International Military Tribunal for the Far East and the other Allied War Crimes Courts, which judgments, Japan agreed to recognize under the provisions of Article XI of the Peace Treaty. The sovereignty which the United States, along with the Condominium of Allied Powers, exercised over Japan continued until the coming into force of the Peace Treaty on April 28, 1952.

Upon the coming into force of the Peace Treaty, the sovereignty over Japan was returned to the Japanese people *with reservations* contained in the Security Pact made between the United States and Japan. The Security Pact and the Peace Treaty were simultaneously executed. The Security Pact limited the extent of the land area which would revert to Japanese sovereignty and, the areas over which the United States was to continue to exercise control, was to be spelled out by Administrative Agreement. Such agreement was entered into on February 28, 1952 and became effective simultaneously with the coming into force of both the Peace Treaty and the Security Pact, namely, April 28, 1952.

Article II, Par. 3 of the Administrative Agreement reads as follows: "3. The facilities and areas used by the United States armed forces shall be returned to Japan whenever they are no longer needed for purposes of this Agreement, and the United States agrees to keep the needs for facilities and areas under continual observation with a view toward such return." Article III reads: "1. *The United States shall have the rights, power and authority within the facilities and areas* which are necessary or appropriate for their establishment, use, operation, defense or control. The United States shall also have such rights, power and authority over land, territorial waters and airspace adjacent to, or in the vicinities of such facili-

ties and areas, as are necessary to provide access to such facilities and areas for their support, defense and control. In the exercise outside the facilities and areas of the rights, power and authority granted in this Article, there should be, as the occasion requires, consultation between the two Governments through the Joint Committee." (Italics supplied.)

It is the contention of the appellee that, by virtue of the agreements which went into effect on April 28, 1952 and the international law relative to acquiring sovereignty by conquest, and the return thereof, that full sovereignty was not restored to Japan but continued in the United States over certain specified areas and facilities. Those areas and facilities are spelled out by agreements. Camp Weir is included (Appendix IX).

For the purposes of this case, it is not necessary to maintain that "sovereignty" as such, continued in the United States over these areas because when the consent of the Japanese government was given to the United States to operate and maintain areas and facilities within the territorial bounds of Japan it thereby granted immunity to the United States from the exercise of Japanese jurisdiction over those areas. This is not a new principle of law. It is recognized in the United States in the relationship between the States and the Federal government. The relationship between the States and the Federal government is akin to the relationship between nations (Appellant's Brief, p. 58). The above doctrines, re sovereign rights, are recognized in the common practice involving the establishment of Embassies and the entry of ships flying a foreign flag into the territorial waters of another nation. *United States* v. *Flores*, 289 U. S. 137.

In the framework of our own national government, each State is sovereign within its own boundaries except insofar as it cedes to the Federal government the right to maintain facilities, military, postal and others within the area of the State. When the State consents and imposes no re-

striction, the jurisdiction, criminal and civil, exclusively in the Federal government. United States Constitution, Article I, Sec. 8, Cl. 17.

The rule of exclusive criminal jurisdiction over an area ceded to the Federal government for its use was reaffirmed in *People* v. *Hillman*, 246 N. Y. 467. In that case a crime was committed on the West Point Military Reservation which is located wholly within the territorial bounds of the State of New York and which is used as a United States Military Academy. The Court of Appeals said: "If the crime in fact occurred at a place purchased "by the consent of the Legislature" of the State of New York and used as the West Point Military Reservation, then the trial must be held according to the laws made by the United States Congress and before a tribunal selected by it" (p. 472). The rule is the same if the area is purchased, rented or just used with consent.

Under international law the same doctrine of immunity from the jurisdiction of the local sovereign has been recognized. Not only is the person of the Ambassador, his accredited agents and servants immune from the sovereign laws of the country to which he is assigned, but his personal property and the buildings and area used by him in the performance of his governmental function are likewise immune. *Frend* v. *United States*, 100 F. 2d 691; *Diplomatic Immunity to persons and property*, 26 A. J. I. L. 50; *Ex Parte Cabrera*, 4 Fed. Case No. 2,278. The same rule applies to the ships of one nation entering the territorial waters of a foreign nation. Such a ship is considered a part of the territory of the nation to which she belongs. *United States* v. *Flores*, *supra*; *Wildenhus' Case*, 120 U. S. 1.

Armed Forces entering upon or stationed in a foreign country have always been immune from the civil and criminal jurisdiction of such foreign country. The facilities used and the land area occupied was likewise immune from local

jurisdiction. Few cases involving immunity of facilities and land area appear to have arisen under international law probably because the personal immunity was in itself a solution to the problem. Here, however, the government contends that there was no personal immunity under international law inuring to our soldiers in a foreign country. Appellee contends that, not only was there personal immunity, but that there was territorial immunity as well, since the event occurred in an area which was either under the sovereign control of the United States or over which the Japanese government consented to have the United States exercise control. The giving of such consent carries with it the surrender of Japanese jurisdiction over the area. Japan would have no right to exercise jurisdiction over an offense committed, for example, in the American Embassy in Tokyo or one committed aboard an American ship plying the water of Japan.

Unfortunately, time does not permit a more detailed study of the international law problem here involved. On general principles, it would appear that there is something incongruous about inviting the American forces to the Island of Japan to protect that Island from outside aggression (See Preamble to Security Treaty), to grant to the United States the right of user of certain areas and at the same time assert that there was no immunity—personal or territorial.

What if Girard, instead of guarding government property, at Camp Weir, were assigned to guard secret documents in our Embassy building in Tokyo and in so doing caused the accidental death of a prowler, within the building, whom he tried to scare away? Would the Japanese have jurisdiction in such a case? Legally there is no distinction.

POINT IV

Exclusive jurisdiction over offenses committed in the course of assigned duty by persons in our armed forces is in the United States. This is the rule even though the act complained of violated the laws of the territory as well as the military code. Surrender to a foreign jurisdiction to punish for an offense committed in performance of military duty is contrary to United States policy and unauthorized in law.

Persons acting in the course of duty as an agent of the United States are accountable only to United States Federal jurisdiction for alleged unlawful acts, civil or criminal. *In re Neagle*, 135 U. S. 1. This is the rule and the policy of the United States as expressed by statutes. It is applicable to persons in or out of military service (28 U. S. C. 1442, 1442a). In cases involving military personnel, a Court-Martial is the appropriate United States tribunal. *United States* v. *Daniels*, 279 F. 844.

This is the rule even though there may be concurrent jurisdiction and the act complained of is violative of both the law of the territory and the military code. Other nations apply the same principle. *Brown* v. *Cain*, 56 F. Supp. 56; *In re Fair*, 100 F. 149; *Petition of Drury* v. *Lewis*, 200 U. S. 1; *United States* v. *Lipsett*, 156 F. 65; *In re Wulzen*, 235 F. 362; *Petition of Delgado*, 57 F. Supp. 460; *Colorado* v. *Maxwell*, 125 F. Supp. 18. See also, Opinion of Honorable Joseph C. McGarraghy in the instant case, wherein many authorities are cited and the cases relied upon by the Government distinguished.

The Uniform Code of Military Justice, designed to govern the Armed Forces of the United States provides: "This code shall be applicable in all places" (Article 5). This means all places and not continental United States only and the Executive branch of the government is without

power to vary the terms of that code by administrative agreements, protocols, or in any other manner. *Swain* v. *United States*, 28 Ct. Cl. 173, affd. 165 U. S. 553; *Talbott* v. *United States*, 215 F. 2d 22, reversed on other grounds, 350 U. S. 11. The Executive is likewise without power to surrender for convenience, appeasement, political expediency, or otherwise, any citizen of the United States or other person, to any foreign government for trial without express authority by law or treaty. *Valentine* v. *U. S.*, *supra*; *Artukovic* v. *Boyle*, 107 F. Supp. 11; *Shachtman* v. *Dulles*, 225 F. 2d 938, and the Executive branch of the government has no inherent power to do so. *Youngstown* v. *Sawyer*, *supra*; *Tucker* v. *Alexandroff*, *supra*; *Geofroy* v. *Riggs*, *supra*; *Whitney* v. *Robertson*, *supra*. Even if no "performance of duty" problem is involved, the military personnel of one nation may not be surrendered to the claiming nation unless a specific *valid* treaty covers the subject.

The main prop of Appellants' argument is that, even if there is immunity in the visiting force, jurisdiction may be waived by agreement and that the President acting within the scope of "plenary powers" vested in him, may waive jurisdiction, if waiver provisions are contained in the agreement. Ordinarily, nations may contract to disregard a rule of international law and to be governed by treaty stipulations only. Insofar as the United States is concerned, the making of such a contract must conform to constitutional requisites and relate to a matter which is not within constitutional prohibitions. If even a validly executed treaty encroaches upon rights which the Constitution guarantees to the individual then, to the extent that it does so, it is invalid. *Reid* v. *Covert*, *supra*. What other nations may or may not do is no criterion for the course which this nation must follow by constitutional directive.

POINT V

No citizen of the United States or any person subject to the control of the United States may be delivered or surrendered by the authority of the United States to any foreign government for trial of an alleged offense unless a valid treaty of extradition so directs.

In the international sense, extradition may be defined as the surrender by one nation having control over an individual accused of crime to another so that the latter may punish for an offense which was committed within its boundaries. *Terlinden* v. *Ames*, 184 U. S. 270; *Fitzpatrick* v. *Williams*, 46 F. 2d 40.

The right of one independent government to demand and receive from another the custody of an offender rests solely on the existence of treaty stipulations between them. *U. S.* v. *Rauscher*, 119 U. S. 407; *Artukovic* v. *Boyle*, *supra*.

While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender an accused and if may be under a moral duty to do so, the legal right to demand him and the correlative duty to surrender him to the demanding sovereign exists only when created by treaty. *Valentine* v. *United States*, *supra*; *Factor* v. *Laubenheimer*, 289 U. S. 713, affd. 290 U. S. 276; *United States* v. *Rauscher*, *supra*.

In the absence of an extradition treaty, directing that a person be surrendered, the Executive has no power to turn him over to a foreign government since no discretionary power exists. *Valentine* v. *United States*, *supra*.

Whether the Executive may surrender a person to a foreign government for trial is a judicial question. *In re Lacke*, 20 F. Supp. 658; *Neely* v. *Henkel*, 180 U. S. 109; *Bernstein* v. *Gross*, 58 F. 2d 154; *Artukovic* v. *Boyle*, *supra*.

Referring to the surrender power, this court in the case of *Holmes* v. *Jennison*, 39 U. S. 540, said, in effect, that in the United States, the general opinion has been, and practice has been in accordance with it, that in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power. Chief Justice Taney also crystalized in that case the rule that as the rights and duties of nations toward one another, in relation to fugitives from justice, are a part of the law of nations and have always been treated as such by the writers upon public law, it follows that the *treaty making power* [the Executive, acting with the advice and consent of the Senate] must have authority to decide how far the right of a foreign nation in this respect will be recognized and enforced, when it demands the surrender of anyone charged with offenses against it. See also Moore, *On Extradition*, Vol. 1, Page 21; Vogt, *Foreign Relations* (1873), Part 1, Page 81.

In *Tucker* v. *Alexandroff*, *supra*, 431, it was said: "In Moore on Extradition (Sec. 408,) it is laid down as a general proposition that, in the absence of a treaty, the surrender of deserting seamen cannot be granted by the authorities of the United States; and an opinion of Attorney General Cushing (6 Op. 148,) is cited upon that point. There is also another to the same effect. (6 Op. 209.) It is believed that in all the instances which arose between the United States and Great Britain prior to the treaty of 1892 for the reclamation of deserting seamen, both powers have taken the position that in the absence of a treaty there can be no reclamation. Several instances of this kind are cited by Mr. Moore in his treatise."

The construction of an extradition treaty is for the courts and they are not bound by the construction placed thereon by the executive or by the construction placed thereon by the foreign country with whom the treaty is made. *Ex parte Charlton*, 183 F. 880, affirmed *Charlton* v.

Kelley, 229 U. S. 447. The same is true of the administrative agreement and protocol in this case.

The Defense Department was without power to surrender Girard or waive any right which affected him because (1) there is no Legislative provision or Treaty directing or permitting it; (2) there was no express authority to do so in the Administrative Agreement or Protocol; (3) no procedure was provided; (4) to do so would be in contravention of the legal meaning of the words, act done "in performance of official duty" contained in the Protocol; (5) because political reasons and political decisions of expediency are not laws; and (6) because the persons, acting on behalf of the Defense Department in this instance exceeded the scope of their agency. See hearing before sub-committee Senate Armed Forces Committee held June 5, 1957, in the case of William S. Girard.

Upon principles of international law and, independent of statutory provisions or treaty stipulations, courts of justice are neither bound nor authorized to remand persons for trial to a foreign government whose laws they are supposed to have violated. *U. S.* v. *Davis*, Fed. Case No. 14,932. A foreign government has no right to demand of the government of the United States the surrender of one of our citizens or a citizen of such foreign government, unless there are specific provisions in a *valid* treaty to which it may point. Such right to demand extradition has no existence without, and can only be secured by, a treaty stipulation. *Ex parte McCabe*, 46 F. 363; *Valentine* v. *United States*, *supra*.

The United States Government has never acknowledged the right of foreign nations to demand the surrender of a person charged with crime or a fugitive, independent of Treaty stipulation. *In re Fitter*, 23 N. J. Law 311. The President would not be justified in directing the surrender of a person in order that he may be brought to trial in the country where he is supposed to have committed an offense, when there is no stipulation to that effect by Treaty between the two governments (1831, 2 Op. Atty. Gen. 452).

The Appellants assert that the laws respecting extradition are not here applicable first, because Girard is in Japan and it is not sought to take him from the United States and second, because absolute authority is in the Defense Department, under Article 14, Uniform Code of Military Justice, to surrender any soldier to any government anywhere in the world, to answer criminal charges (Appellants Petition for Certiorari, pp. 24, 25). Both contentions are without merit. Extradition is designed to take an individual from the *control* of the government to which the request is directed. Usually, control exists because the person sought is within the territorial limits of the nation upon which demand is made. But what of a case where an American citizen takes refuge in one of our Embassy buildings? Unless there is a valid extradition treaty, we do not have to surrender him. It is *control* which is the important factor and not the territory where the person happens to be. Girard is now in the control of the U. S. Government on a U. S. military base in Japan. The Japanese authorities may not enter our military base to seize him and the Executive may not surrender him except pursuant to some statutory or treaty provisions which requires or permits him to do so.

As for the power, which Appellants say exists by virtue of Article 14, UCMJ, a study of the legislative history of this article indicates that it was intended to apply only within continental United States. Secondly, delivery to the State or County civil authorities of the U. S. is authorized only "subject" and pursuant to "such regulations as the Secretary of Defense may prescribe". No such regulations have been prescribed and the Defense Department is not empowered to act arbitrarily. Thirdly, if Article 14 were intended to vest arbitrary power in the Department of Defense or other department of this government to deliver American soldiers to a foreign government for trial without any limitations as Appellants contend, then Article 14, UCMJ, is unconstitutional, the same as the other provisions of this Code, already so declared by this Court. *Toth v. Quarles, supra; Reid v. Covert, supra.*

POINT VI

The position of the appellants is untenable and destructive of constitutional rights.

Predicating authority on vague and nebulous powers allegedly vested in the Executive Department, attempt was made to deliver Girard to the Japanese government for trial. It is asserted that no extradition is necessary and that no judicial hearing may be afforded to determine the propriety of such action; that the President has the exclusive right to make "political decisions"; that jurisdiction is a political matter under the self-executed agreement made with Japan and that there must be no breach of that agreement. Japan, on the other hand, must know that no Agreement or Treaty with the United States is valid without ratification, *In re Sutherland*, 53 F. 551, and that our law does not permit ratification by implication. *Gelston* v. *Hoyt*, 16 U. S. 246; Taylor, *International Public Law*, Sec. 364.

Power to act is one thing, and the propriety of the exercise of that power is another. Certainly, the Executive, through the military has it within his power to act, regardless of the illegality of the action, but if the so-called Administrative Agreement is valid, what would happen in the event Girard was either outside of military control or had returned to the United States? If, as appellants contend, the agreement is valid and we must honor it by delivering Girard to the Japanese authorities for trial, they must also argue that they may enter Girard's home in Illinois, and remove him therefrom for delivery to the Japanese authorities. There is nothing in any of the documents making the time or place of seizure a determining factor in so far as obligation to return him is concerned.

If, as appellants contend, he is not entitled to a judicial hearing while in Japan, he is not entitled to a judicial hearing while he is in the United States. That being so, he *could be removed from* his home and turned over to a

foreign government merely on a "political decision" of the Executive. It is hard to believe but this is the contention of the Appellants and if there is any merit to it, the Soviet Gestapo system begins to loom mild by comparison.

It is also incredible to appellee's counsel that an officer of the United States would assert before a court of the United States that a citizen's rights may be determined by a "political decision" of the Executive. The asserted power, pursuant to which the Executive seeks to sacrifice the person of Girard to satisfy Japanese public clamor, must also encompass the right to whisk Girard out of his native state and country. It has been contended that we are overstating the appellants' position, but at what point, territorially, does the power cease? When Girard is one mile off the coast of Japan? When he is midway over the Pacific Ocean? Or when he touches American soil?

Japan has tried and imprisoned more of our soldiers than any other nation in the world (Senate Armed Services Committee Hearings, April 9, 1957). The horrible conditions under which they are confined are in only a small degree described in an article published in the American Legion Magazine, January, 1957 issue entitled: "*We learned about Jap prisons from the inside.*" It is not pleasant reading. Of course, General Hickman says that the "allegations are not well founded." He admitted, however, that American soldiers were imprisoned under conditions which appeared to be a violation of Article 12 of the Uniform Code of Military Justice and that "there are specific unresolved problems [respecting imprisonment] in some countries. * * *" Report of Hearings before Subcommittee, Senate, Armed Services Committee. April 9, 1957.

The self-invested authority to make law by administrative agreement, under which citizens of the United States may be forcibly delivered to foreign courts for trial in violation of their most fundamental constitutional rights, and denied access to their own courts on the ground of unlimited

and uncontrolled "political" power is not tenable and not one which should find favor in our courts. This is absolute dictatorship and should be condemned. (see Appendix I): "Power corrupts—Absolute power corrupts absolutely."

To illustrate further, how utterly untenable the position of the government is from the standpoint of American prestige and honor, a hypothetical case will be conjectured. Assume that instead of Girard, a high ranking staff officer of our Far Eastern Command were involved. It is not without the realm of foreseeable possibility that he may attempt to scare away trespassers gathering for themselves property which belonged to the United States and that in so doing, he fired a blank cartridge which results in the death of a Japanese national. After the event and to make political capital, the same clamor for trial before a Japanese Court is stirred up and the Japanese government takes the same adamant position which was taken in this case. The final determination as to who shall exercise jurisdiction is with the Japanese as hereinabove indicated. Must we surrender this officer to the Japanese for trial or will the Executive head of this government make one "political decision" for the officer and another for the foot-soldier? Both fall within the identical provisions of the agreement which it is said the Executive made with Japan. But we do not have to use the pattern of the Girard case as an example. Another would be simpler and equally within the range of possibility. Assume, an officer on a non-duty status, or the Commanding General himself, while driving an automobile, injured or killed a Japanese national and that in so doing he violated a Japanese traffic regulation which appeared on a signboard but which he could not read. Being on a non-duty status, there would be no question but that under the agreements, if valid, Japanese jurisdiction would attach. The thought of having one of our officers, particularly one of high rank tried before a civilian tribunal of the foreign, former enemy nation, to which he is assigned, is rather absurd and degrading, to say the least.

Throughout the ages the army carried with it its own code of law when in the territory of a foreign sovereign. Now the United States submits its officers and enlisted men to the civil courts of a former enemy nation even though we are in that nation's territory by invitation and for the protection of that nation against aggression. Under our constitution and laws, it may not be done—at least not in the manner it was attempted here.

POINT VII

Appellee would not receive a "fair trial" in the Japanese Courts on standards generally recognized in the Courts of the United States (Federal and State).

Appellants' argument, advanced with great force in the District Court, that Appellee would receive a "fair trial" in a Japanese Court, begs the issue. Fairness is a relative term. Admittedly, constitutional safe-guards of substantive law, evidence and procedure, would not be available to Appellee in a Japanese Court.*

* In an attempt to foreclose this Honorable Court from being informed as to the character of "justice" and the type of "fair trial" one receives under Japanese law, the Appellant made the gratuitous statement on page 57 of its brief, that the Appellee "disavowed in the District Court any contention that his trial by Japan would be unfair or unjust". This statement is incorrect. The subject was argued at length in the District Court by both sides. The United States Attorney referred the District Judge to all the basic guarantees of a "fair trial" which an accused enjoys. He told the Court "the President himself has stated that we can expect fair treatment at the hands of the Japanese Courts". Appellee's counsel argued the contrary and in the memorandum which was submitted pointed out that trial in a Japanese Court would not be fair under the law of "due process' as we know it.

The issue of "fair trial" is brought before this Honorable Court because it tends to show the extent to which the men in our Armed Forces are stripped of constitutional rights by the 'surrender of jurisdiction program' presently in vogue.

At Hearings held on April 7th and 8th, 1953, before the Senate Committee on Foreign Relations, it was demonstrated that the so-called benefits which an American soldier would receive by trial in a foreign court is about as beneficial as the "hangman's noose". It was admitted by the government witnesses that in certain countries a *secret trial* may be had; that *no jury* was required; that there was *no presumption of innocence*; that witnesses could not be compelled to testify, and that upon any evidence acceptable to the foreign court, an American soldier may be put to death or have such other punishment inflicted on him as the tribunal determined. In countries operating under the Napoleonic code, it is even worse because the presumption of guilt rule applies. Of course, the government officials are quick to say that no such thing *has* happened but they admit that under the "Administrative Agreement" involved in this case it can happen—in which event, of course, there is no redress.

The Secretary of Defense, Honorable Charles E. Wilson, one of the Appellants herein, when testifying before the Senate Committee on Foreign Relations on April 7, 1953, pointed to the several alleged basic rights which are guaranteed an American soldier before a Foreign Court—seeking to indicate that the equivalent of "constitutional safe-guards" and "due process" would be afforded. He said the accused would be entitled to (1) a prompt and speedy trial. Senator Knowland's comment was very appropriate. He said "he would get that even in a Communist country." General Hickman's testimony, contained in the record of other Congressional Hearings, showed that a prompt and speedy trial is not always afforded (Appendix VIII). In a case which has come to light in this court (*Cozart* v. *Wilson*, *supra*), fifty weeks were required for the trial and a total of twenty-two court sessions. Pending trial in the *Cozart* case, the two petitioners were kept in jail for a period of fourteen months. These facts belie what Mr. Wilson said to the committee members about a prompt and speedy trial.

Mr. Wilson then pointed to other so-called rights of the Defendant: (2) "to be informed, in advance of trial, of the specific charge against him.". This is the least that could be expected anywhere. In any event, it has been reported that in certain cases before the Japanese Court the charges were served just prior to the commencement of the trial; (3) that witnesses must confront the accused. How can this be beneficial to the accused when he does not know what is being said and there is no conformity to the rules of evidence, as we know them? (4) to have compulsory process *if* the witnesses are within the jurisdiction. But what if a major witness is one mile over the border? The taking of depositions, a very important right conferred by the Uniform Code of Military Justice, is not available to a soldier charged before a foreign court. In addition, under the Uniform Code, compulsory process is not limited to a specific area and witnesses may be transported from one country to another, if necessary. Further, this alleged basic right of compulsory process is meaningless because, even if you do compel the witness to appear in the court, under the law of certain foreign countries, he is not compelled to give any evidence. In some foreign courts, and we do not know whether this is true in Japanese Courts, witnesses do not appear. Information comes to the presiding judge in the form of a dossier prepared by the Magistrate. The procedure does not allow questioning or cross-examination except by the judge himself. Mr. Wilson, nevertheless, and other government officials, point with pride to all these procedures as satisfying "due process" and constitutional safe-guards.

Mr. Wilson, continuing, said; (5) there is the right to have legal representation of one's own choice. But what of a case like the present one where the Japanese lawyer, who was discharged by Girard, publicly stated that he may not be discharged and that in the event he were, the court would reappoint him. This is an example of the so-called

basic right to have legal representation "of one's own choice"; (6) the accused may have an interpreter "if he considers it necessary", and (7) the accused may communicate with a representative of his own government.

The above constitutes the "Bill of Rights" which the American soldier has when he finds himself in difficulty with the laws of a foreign nation to which he was sent by military order and these are the rights which the government says satisfy constitutional requisites of due process.

"But what about the right to trial by jury", asked Senator Knowland and "the right to the presumption of innocence", asked Senator Ferguson, "and the provisions for bail", asked Senator Langer, and we may add: What about the right to a public trial; to release on bail; rights against double jeopardy; against cruel and unusual punishment; to proof of guilt beyond reasonable doubt; to a preliminary showing of probable cause; to remain silent without adverse inference being drawn therefrom; to *habeas corpus;* to appellate review; to protection against *ex post facto* laws, unreasonable search and seizure, bill of attainder, excessive bail; the right to compel witnesses to appear *and* testify; to apply for Presidential Pardon and a host of others?

All the above mentioned rights, which "due process" and constitutional safeguards guarantee in a trial before an American court are stripped from the American soldier when he is tried before a foreign tribunal. These are not important said one of the "top lawyers", an assistant secretary for the Defense Department when he testified before the Senate Foreign Relations Committee on April 7, 1953. He said in his opinion all the requirements of "due process" are satisfied "if a man has a chance to prove his own case, to develop his own case and prove his own facts, that would be all that would be absolutely required in elemental justice and equity; Yes, sir," (Appendix III). Other witnesses who testified for the government indicated that they were equally lacking in knowledge as to what constitutes due

process under our constitutional form of government. Regardless of the manner in which it is twisted, the fact remains that a trial before a Japanese Court *is not* and *cannot* be the same as a trial before an American tribunal.*

Court Of Military Appeals in *United States* v. *Charles V. Burney*, 21 C. M. R. 98, 124 said:

> "It was the intent of founders of our Constitution to insure basic guarantees of due process to each citizen. * * * *The courts of foreign sovereigns, especially in civil law countries, are bound to follow traditions which are foreign to American standards of due process of law.* Far better it is for an American accused to be tried by American court-martial, where he is entitled to representation, liberal rules of evidence, a presumption of innocence, and thorough review, than to be brought before a French, or Japanese, or German, or Moroccan, or even English civil court. In addition, because we are a nation of civilian soldiers, sailors, and airmen, many of the persons who now serve as court-martial members are the selfsame individuals who previously served on grand and petit juries, and their views of justice do not change with their garb." (Italics supplied.)

In the concurring opinion of Chief Justice Quinn in the *Burney* case, the following appears at page 125:

> "At the outset, it is important to repeat what I said at the beginning of my dissenting opinion in

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* A United Press release under date June 16, 1957, Tokyo, publishes an interview with Mr. Raymond N. Bushell, an American lawyer admitted to practice before Japanese Courts. He is reported to have said: "Japanese justice is a joke," operated under "19th-Century procedures." Bushell said he has seen Japanese convicted in civil courts on evidence that would not even warrant indictment in the United States * * * that under outmoded procedures "Japanese lawyers continually advise their clients to plead guilty regardless of guilt or innocence and tell a 'sob' story to the judge in hope of getting a suspended sentence." He said that if the Japanese prosecutor tells the court a defendant is guilty, the judge is convinced the man is guilty * * * and that it is not necessarily a fact that if Girard went before a Japanese court he would receive a light sentence, "unless you consider 20 years a light sentence."

United States v. Sutton, 3 U. S. C. M. A. 220, 228, 11 C. M. R. 220: 'I have absolutely no doubt in my mind that accused persons in the military service of the Nation are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself.' Consequently, in my opinion, there is no merit to the argument that the Constitution has no application outside the continental limits of the United States. The cases cited in support of that argument deal with the general question of the territorial application of the Constitution. Hawaii v. Mankichi, 190 U. S. 197, 23 S. Ct. 787, 47 L. ed. 1016; Downes v. Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088; or with the practical inapplicability of specific provisions of the Constitution to "residents or temporary sojourners aboard." Ross v. McIntyre, 140 U. S. 453, 464, 11 S. Ct. 897, 35 L. ed. 581. *Our armed forces are now stationed in 63 foreign countries, as part of our program of national defense and our effort to preserve the peace of the world. They are not thereby deprived of their Constitutional rights and privileges. On the contrary, those Constitutional rights and privileges are a fundamental part of the military law. And the military law governs our armed forces whether they are within or without the continental limits of the United States.*" (Italics supplied.)

THE PRESENT POLICY OF THE UNITED STATES TO SURRENDER JURISDICTION IS LEGALLY UNTENABLE AND MORALLY WRONG: Aside from the illegality of the "executive agreements" designed to confer criminal jurisdiction on foreign tribunals to punish, to lodge in jail, or to execute American soldiers assigned to overseas duty, it is morally wrong to draft or accept as volunteers in the Armed Forces the youth of this nation, request them to lay down their lives if need be, to protect the Constitution and Government of the United States and at the same time strip them of every vestige of Constitutional right.

All the protestations and voluble talk emanating from the supporters of Status of Forces agreements cannot change the fact that the morale of the American troops all over the world has been seriously impaired. Of course, the lonely voice of the G.I. stationed in the desert of Arabia or on a frozen plateau in Iceland or at military bases in Formosa, Greece, Turkey, Japan or elsewhere is hardly a whisper to be heard anywhere. To be imprisoned in one of these places reduces his voice even further. He is disenfranchised.

What sympathetic or helping hand can the G.I. expect from the populace of a nation we only too recently conquered? Trial in our own courts would not give rise to this situation. The men in our armed services come from all walks of life. Some dull, others excelling in mentality; some brave, others meek; some have the ability of expression, others do not. When we judge our own people we are better able to take these various factors into account but note what a Japanese Judge takes into account when he imprisons an American soldier. He considers the fact that the accused, an American soldier, failed to comply with a Japanese custom of expressing sympathy (Appendix X).

In the Congressional Record, February 20, 1956, page A1552, appears the following: "Congressman Frank J. Becker, New York, visited American Servicemen imprisoned in foreign jails. He concluded that the protection of the United States Constitution has been taken away from these citizens serving us overseas by the Status of Forces Treaty. These are the GI's who had been tried and convicted in foreign courts and are now serving sentences in foreign prisons.

Those imprisoned in France and England were visited. All the GI's in England said that they would have preferred to be tried by Army or Air Force court martial. They felt that they would have had a much fairer trial

and would have preferred to have an American officer defend them, even if they would have received more severe penalties from United States authorities. This was the rule before the Status of Forces Treaty.

In France, a man is guilty until proven innocent; under our Constitution a man is presumed innocent and must be proven guilty. All but one GI would have preferred the court marital to prosecution in the French courts. Their trials were conducted in French; in two cases the French lawyers could not speak English." (Italics supplied.)

CONCLUSION

The order appealed from should be affirmed and upon affirmance modified to the extent of ordering release from custody forthwith.

Respectfully submitted,

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Appendix I

Extract of letter dated July 15, 1955 from the former President of the American Bar Association, Hon. Frank E. Holman, to the Chairman of the House Foreign Affairs Committee, expressing opposition to the Status of Forces Agreements.

* * * Marshall then went on to say no sovereign whose troops are in the territory of a friendly foreign state could afford to surrender exclusive control over those forces.

In *Coleman* v. *Tennessee* (1878) (97 U. S. 509, 515), Marshall's doctrine, widely accepted throughout the civilized world until the Status of Forces Treaty, was briefly summarized as follows:

> "It is well settled that a foreign army, permitted to march through a friendly nation, or stationed within it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place."

To the same effect is *Dow* v. *Johnson* (1879) (100 U. S. 158, 165).

In fact, at the time the Status of Forces Treaty was approved by the Senate, the Army Manual provided that our own Armed Forces retained exclusive jurisdiction over our soldiers located without the country. In other words, after the representation had been made to each American soldier ordered abroad that he could only be subjected to American military courts, a treaty was made and ratified which destroyed the legal protection which was in force when he left the country.

It will not do to say that this fundamental principle of international law only applies in time of actual occupation of a country during the progress of a war. This distinction was never made until it was first advanced by the Senate Foreign Relations Committee in connection with the Status of Forces Treaty. Of course the situation is and always has been very different where nationals of one country, even soldiers, are in a foreign country casually or for some personal or business reason.

The fact is that the Status of Forces Treaty was contrived by the State Department with the hope that it would help secure ratification, particularly by France, of EDC.

The State Department had already, with a view to placating French sensibilities, entered into a secret executive agreement with France along the lines of the Status of Forces Treaty and, to confirm this secret arrangement and put other countries on the same basis, the Foreign Relations Committee of the Senate recommended that the secret agreement be formalized by treaty. Senator Knowland, the majority leader in the Senate, in the debate on the Status of Forces Treaty admitted that if the matter were before the Senate as an original proposition, no such arrangement would be acceptable to him.

There is nothing in the record of the hearings before the Foreign Relations Committee or in the Senate debate, or elsewhere, that indicates that any of the countries involved either denied the traditional principle of international law above referred to, or undertook to impose as a condition of our troops being on their soil the right to try them in the local courts. The whole matter was a sheer gesture of appeasement on the part of the State Department, and, as in most cases of appeasement, the appeasement accomplished nothing. In spite of the Status of Forces Treaty, France did not ratify EDC. We not only let the nations that are friendly try our military personnel and lodge them in foreign jails, but we have adopted the same folly of appeasement with respect to our American GI's who are now lodged in Chinese jails.

It is no comfort to the wives and mothers of America and to our soldiers compelled to serve in foreign lands to be told that the Constitution does not follow the flag, even though the idea is dressed up in some such phraseology as that "The Constitution cannot limit the operation of foreign courts within the territory of a foreign nation." This is not the point of the matter. There is no question of limiting the operation of foreign courts. The point is, surrendering by treaty the right of an American GI to be tried as the Constitution itself provides in accordance with rules and regulations established by the Congress of the United States, and in accordance with the traditional and established rule of international law as it existed before changed by a treaty of appeasement (italics supplied).

Appendix II

A series of questions by United States Senators and answers given by Government Officials who appeared in support of the NATO, Status of Forces Agreement at the Hearings held April 7 and 8, 1953, before the Senate Committee on Foreign Relations.

Senator Green: 'Is there any special reason why they are brought up now for ratification?

Secretary Wilson: Well, they cannot be put into effect by the United States until you gentlemen ratify them; that is the reason they are here. p. 13

Senator Knowland: Is it the judgment of the Defense Department and yourself, as Secretary of Defense, that this format of an agreement is going to be a precedent * * *

Secretary Wilson: That is very likely; it is not necessarily so, but it is probably so. p. 15

Senator Knowland: * * * Where we are drafting and sending abroad large numbers of Americans—both the military forces and their dependents—do we not have an additional obligation to see that whatever legal processes they are finally brought under they are in keeping with American standards of justice?

Secretary Wilson: I think that is pretty well taken care of by the agreements, too * * * p. 16

Senator Langer: * * * I do not see any provision whereby our men in foreign countries would have any right to trial by jury?

Mr. Haydock: * * * most of the continental countries * * * have a civil law system which is based on the early Roman law, and they have a somewhat different procedure. They do not recognize a trial by jury * * * p. 18

Senator Knowland: * * * since this is being done as much for their protection as for ours, and since we are laying out vast sums of money and sending large bodies of troops abroad, as well as arms, it seems to me we should be in a position to get a reasonable *quid pro quo* for our people * * *

Secretary Wilson: * * * I was not worried about the countries which have the same common-law background as we. You are referring however to the chance that under two different systems there may be some miscarriage of justice * * * through the years it has developed that the emphasis in our system on presumption of innocence is largely an emphasis on words * * *

Senator Ferguson: I am compelled to disagree with that. I think the presumption of innocence is one of the very fundamentals in America, and it is well understood by juries and by lay people. pp. 21, 22

Secretary Wilson: * * * I realize that you men are discussing fundamental things, because we do not follow their courts and methods of justice up to a point, although with certain reservations.

Senator Ferguson: I think that is the whole point. p. 22

General Smith: Senator Knowland asked * * * What is the basic difference between * * * these agreements and that which we had in World War II? In World War II * * * we had complete extraterritoriality * * * p. 23

Senator Wiley: In what respects, then, if any, will the agreements change the status of the United States Forces?

Mr. Yingling: They will not change them substantially * * * except in the direction of bettering them. pp. 23, 24

Mr. Phleger: * * * Under this proposed agreement the United States military authorities will have exclusive jurisdiction * * * for offenses arising out of any act or omission done in the performance of official duty. * * * That leaves as the only area in which the foreign country will have jurisdiction criminally an offense committed by a member of our force when he is not engaged in official duty. * * * p. 25

Senator Ferguson: I am interested in the point that Mr. Phleger made with respect to our exclusive jurisdiction on military reservations.

Mr. Phleger: That is not right. If he is on an Army post, engaged on duty, we have exclusive jurisdiction. We do not have territorial jurisdiction, as such.

Senator Ferguson: Would it not be hard to conceive that the commission of a crime would be in line of duty?

Mr. Yingling: Well, it might be in the course of the performance of official duty. p. 27 * * * a man, for instance, who is a guard on a post may shoot somebody. p. 28

Senator Ferguson: Yes; I can see how that would happen.

Mr. Yingling: Then the question would come up whether he used excessive force; therefore whether he committed an offense. In that type of case we would have jurisdiction. p. 28

Senator Smith: I do not know of any case where we have yielded jurisdiction over our boys abroad to foreign criminal codes, to foreign penalties, to foreign courts.

As I understand it, when we are occupying a foreign country under military conditions, we maintain extraterritoriality, and we take care of our own cases. We do not submit our boys to the jurisdiction of other courts.

I know when we were discussing the Japanese Security Treaty * * * inasmuch as the Japanese criminal code is very different from our Anglo-Saxon one. It seems to me that there is a conflict of jurisdiction involved which is very difficult to resolve.

General Smith: * * * You are quite correct, when you occupy a country under military conditions, that is, as a conqueror or as a liberator, you impose your own extra-territoriality * * * p. 30

Senator Smith: Then apparently there is a conflict between the old Roman law versus the Napoleon Code and the Anglo-Saxon.

Mr. Phleger: That is true * * *

Senator Smith: I am not sure that a jury trial there would mean as much as it would mean here. It would not be a jury of peers; it might even be a jury of hostile population. You are * * * accepting the criminal codes of the 14 countries now in NATO, and agreeing to abide by their definition and their penalties for crimes, as well as by their trial procedures afforded in criminal cases.

Mr. Phleger: Only in a case where the member * * * is not acting in the performance of his duty.

Senator Smith: I understand that. pp. 31, 32

Senator Ferguson: What do you mean the presumption of innocence prevails?

Mr. Phleger: It does in the sense that we use the presumption of innocence * * * they do not apply the rule of evaluating the evidence, as we do, that it must be beyond a reasonable doubt.

Senator Ferguson: Which is a great difference.

Mr. Phleger: Well, we Anglo-Saxons believe it is * * * p. 44.

Senator Knowland: * * * I merely respectfully suggest that perhaps before the NATO agreements were entered into, we should have taken the position that for valid reasons—and I think there are very valid reasons—when we send Americans and their dependents overseas, they are

to be under the jurisdiction of our forces. No one would be forced to take them, but * * * they would go under these conditions * * *. pp. 46-47

Senator Ferguson: That means he can have double jeopardy?

Mr. Phleger: It does if our military forces believe that the offense * * * has not been adequately punished by the civilian authorities * * * p. 48

Senator George: [Is] * * * a member of the armed forces * * * accorded the same rights and privileges, and is [he] tried under the same procedure that any citizen of the receiving state * * * would be entiled to have? * * *

Mr. Phleger: * * * that is the agreement: p. 49

Senator Knowland: * * * I do not believe that the record should stand here that Americans serving abroad should be subjected to * * * penalties * * * which would not necessarily apply to our system of justice. p. 50

Senator Ferguson: Then it does not provide for an open trial * * *

Mr. Phleger: These provisions do not require an open trial * * *

Senator Ferguson: * * * there can be secret hearings * * *

Mr. Phleger: There is a provision * * * that * * * a representative of the United States Government shall be present, where the rules of the Court permit.

Senator Ferguson: * * * that would still prohibit * * * an open trial, if the law provided for it.

Mr. Phleger: That is true * * * p. 55

Senator Ferguson: * * * these agreements do not provide for right of review in the United States?

Mr. Phleger: Not of the United States, no.

Senator Ferguson: Do you think there is a difference between citizens voluntarily [going] * * * to a foreign country * * * and men * * * drafted * * * and sent * * * to a foreign land?

Mr. Phleger: I do not see the distinction * * * pp. 55, 56

Senator Ferguson: Our Constitution prohibits cruel and unusual punishment, but I notice in these agreements nothing is said about type of punishment.

Mr. Phleger: Well, I do not think you expect a sovereign to yield up his right to determine what the punishment for offenses is * * * p. 59

Senator Hickenlooper: * * * By what authority can we execute agreements which affect the life and liberty of our troops?

Mr. Phleger: Senator, if we send our military forces abroad without any agreement they automatically become subject to the jurisdiction of the receiving state * * *

Senator Hickenlooper: Under what authority do our representatives * * * engage in negotiations? Does that authority stem from our civil or military law, or does it come from some other source?

Mr. Phleger: Well, that authority extends * * * from the authority of the military command * * *

Senator Hickenlooper: * * * I am still not clear on the source of the authority.

Mr. Phleger: That comes from a provision of the Constitution that the Chief Executive shall execute the laws of the United States and shall perform the functions and duties of the Commander in Chief, and it is delegated down then to all subordinate officers

Senator Hickenlooper: * * * I do not know that I can agree that it comes from the Commander in Chief's authority. Where is the dividing line between the exclusive jurisdiction of the military and the exclusive jurisdiction of the civilian? * * *

Mr. Phleger: Senator, the basic law is an act of Congress which established the Uniform Code of Military Justice * * * p. 67

General Smith: When our forces go abroad they carry with them the Uniform Code of Military Justice, an act of Congress, and it applies to the Armed Forces regardless of where it is in the world, because it accompanies them. Insofar as the arrangements with the local authorities are concerned * * * whatever arrangements they make are made under the presumable authority of the President in his capacity as Commander in Chief * * * is that not correct? It has never been very clearly defined. p. 68

Mr. Yingling: The status of the American soldier is determined by American law * * *

Senator Ferguson: It would appear, then that this particular agreement does change his status * * *

Mr. Yingling: No. By entering into the treaty we change our law * * *

Senator Ferguson: Then we do by this agreement change the law of a State.

Mr. Yingling: I think so, yes.

Mr. Phleger: Yes.

Senator Ferguson: Then we had better be careful what we are doing. p. 74

Appendix III

Extracts from testimony given by Secretary of Defense, Charles E. Wilson and Assistant Secretary of Defense, Frank Nash at Hearings held before the Senate Foreign Relations Committee, on April 7, 1953.

Senator Ferguson: Mr. Secretary, what about countries where there is no presumption of innocence; where, for instance the presumption of innocence does not apply as it does in America. In other words, a man has to prove himself innocent instead of the state proving him guilty. Mr. Nash, what is our position there?

Mr. Nash: I was about to say at the point of your question, Senator, that these various guarantees that are listed here, as Mr. Wilson just read them to you, add up to just about what this man would get if he were being tried in a military court.

Senator Ferguson: Show us where the presumption of innocence is among these, please. I did not hear it.

Mr. Nash: It is not listed there.

Senator Ferguson: Is that not very vital? Is that not the vital point of the difference between a trial here and in some of these other countries? I did not notice that presumption here.

Mr. Nash: It is not there, Senator.

Senator Ferguson: Why not? Is that not one of our safeguards in America? Is that not really the fundamental of them all?

Presumption of Innocence and Due Process

Mr. Nash: I am not an authority on constitutional law, Senator, and I would hesitate to get into any discussion of it, but I do not think it is one of those fundamentals of due process—

Senator Ferguson: Are you familiar with criminal law?

Mr. Nash: That you would have to have in order to have a fair trial.

Senator Ferguson: Do you consider that presumption of innocence does not enter into due process?

Mr. Nash: I think that if a man has a chance to prove his own case, to develop his own case and prove his own facts, that that would be all that would be absolutely required in elemental justice and equity; yes, sir.

Senator Ferguson: Do you consider that due process in America implies a presumption of guilt whereby a man has to prove himself innocent?

Mr. Nash: I think with American traditions, we would never adopt such a thing, but we have to look at the systems of these other countries.

Senator Ferguson: But we were considering the possible case of a man sent abroad under draft who must stand trial bound by a rule that he is not presumed to be innocent. This would violate the very fundamentals of American criminal justice. Do you think that is right?

STATUS AGREEMENT WITH FRANCE

Mr. Nash: Senator, the best way to answer the question, as I see it, is to say this: In France, where we have had troops for the last 3 years, we have had a status agreement—I cannot go into the details because it is a classified document, but it adds up to this—

Senator Knowland: Why can't this committee have a copy of that agreement? We are asked under our constitutional responsibility to ratify these agreements, and I think we are entitled to have such information.

Mr. Haydock: The information has been supplied to the committee, Senator.

Mr. Nash: If I could complete the sentence, Senator, for 3 years the troops that we have had in France—and there have been quite a large number—under the current agreement with France, we have had less rights for our troops than we would acquire under this NATO treaty; we also have had less under our agreement with Italy.

I just want to make the comment that we have gotten along quite well under their system, although it is different from ours, and, of course, no American would think it as good as ours.

PRESUMPTION OF GUILT—FUNDAMENTAL DIFFERENCE

Senator Knowland: That does not impress me greatly, because we may have been very derelict in entering into that kind of an agreement, particularly if we had so little protection heretofore that this is an improvement. I think the basic point that Senator Ferguson raised is the fact, that if Americans or their civilian dependents are placed under laws of foreign countries, where the presumption of innocence does not apply but the presumption of guilt does apply, it is a very basic change in what we have asked Americans to do.

Now, this is entirely different, in my judgment, from an individual American who is traveling in a foreign country at his own initiative. Here we are taking large numbers of American citizens by draft or volunteers, as the case may be, who recognize the danger of international communism, and transferring them in practically whole communities abroad. Under those circumstances we are subjecting them to an entirely different legal system where they are presumed to be guilty rather than innocent. I think we have made a very basic change in the protection we afford our nationals.

Secretary Wilson: Senator, you put your finger on a very important matter, of course. The difficulty is that we cannot force these partners of ours to accept our system completely.

QUID PRO QUO

Senator Knowland: No, sir; but since this is being done as much for their protection as ours, and since we are laying out vast sums of money and sending large bodies

of troops abroad, as well as arms, then it seems to me we should be in a position to get a reasonable quid pro quo for our people.

I hope you realize that this is not directed at you, because I understand that this agreement was negotiated long before you came into the Defense Department. On the other hand, you are now coming before us and asking us to ratify this, and we are entitled, as I think you understand, to ask some rather searching questions.

Secretary Wilson: I asked the same questions. I was not worried about the countries which have the same common-law background as we. You are referring, however, to the chance that under two different systems there may be some miscarriage of justice.

PRESUMPTION OF INNOCENCE VERSUS GUILT

Mr. Nash has been pointing out that even under the civil-law system, justice has generally been properly developed and, perhaps, through the years it has developed, that the emphasis in our system on presumption of innocence is largely an emphasis on words, and that what actually happens in court—

Senator Ferguson: I am compelled to disagree with that. I think that the presumption of innocence is one of the very fundamentals in America, and it is well understood by juries and lay people.

Secretary Wilson: I understand the great difference, but we do not seem to have had cases where innocent people have been proved guilty in France because they could not prove their innocence. We do not seem to have tangled with that one. (pp. 19-22)

* * *

Appendix IV

Resolution of the American Legion in opposition to the Status of Forces Agreements adopted by its National Executive Committee at its May 4/6, 1955, meeting in Indianapolis. The Resolution appears in the Report of the Hearings held before the House Foreign Affairs Committee in July 1955.

"The Senate of the United States on July 15, 1953, ratified a treaty agreement between the countries comprising the North Atlantic Treaty Organization whereby members of the Armed Forces of the United States stationed in any of the treaty countries should be subjected to trial by the courts of those countries for any criminal offenses alleged to have been committed by them in these countries and, where so provided, to serve sentence in prisons of such countries.

The peace treaty with Japan, as ratified by the Senate on September 29, 1953, included a similar provision concerning members of our Armed Forces in Japan.

The concepts of freedom and liberty for the individual human being in some of these foreign countries differ basically with our American ideas in that here in the United States a person is considered innocent until proven guilty.

The prisons in many of these foreign countries are nothing more than mere dungeons and prisoners are subject to neglectful if not outright cruel and inhuman treatment.

It is evident that many nationals of some of these foreign countries are apparently prejudiced against Americans generally and specifically against those who are serving as members of the Armed Forces of the United States and stationed in those countries.

The American Legion solemnly and energetically urges that the treaties mentioned in this resolution and all similar treaties be modified to the extent that any and all members of the Armed Forces of the United States stationed in foreign countries and charged with crimes of whatever nature committed in these countries may be subjected to trial only by the military tribunals of the Armed Forces of the United States and, upon conviction, be meted out punishment by such military tribunals in accordance with the principles and procedures guaranteed by the Constitution of the United States." (Italics supplied.)

Appendix V

Extracts from statement made on June 22, 1957, by Congressman, Frank T. Bow of Ohio, concerning the illegality of Status of Forces agreements and the injustices resulting from their operation.

* * * The administrative Agreement with Japan, the amendment thereto, and all the other status agreements, are so-called executive agreements, which the administration has given the same force and effect as a treaty. We now have agreements with 54 countries and perhaps others which are classified. Most of them include a provision which confers exclusive criminal jurisdiction over our servicemen to the foreign countries in which they may be serving—at least for alleged offenses when off duty.

There are a number of reasons why these agreements are wrong. I have repeatedly pointed out that they automatically deprive any serviceman of rights granted him by the Constitution of the United States as soon as he is surrendered to a foreign authority for trial. He is thrown into a Constitutional vacuum—for all practical purposes he is no longer a United States citizen—from the time the foreign criminal proceedings are started, until his trial is concluded. After he has paid his penalty, if convicted, the military will reclaim him for the purpose usually of giving him an undesirable discharge, based on his conviction by foreign justice * * *.

The studies of foreign laws, made by the Defense Department at the direction of the Senate, shows these are the rights he is most certain to lose: 1. The right to a prompt and speedy trial. 2. The right to be presumed innocent until proven guilty. 3. The burden of proof on the government to prove such guilt beyond a reasonable doubt. 4. The right not to be compelled to testify against himself. 5. The right not to have involuntary confessions used against him. 6. The right to cross-examine the witnesses against him, which follows from the right to be confronted by such witnesses.

The NATO Status of Forces Agreement and the Amendment to the Administrative Agreement contain provisions which are supposed to protect the rights of an accused. Some persons mistake these for a recitation of Constitutional rights. The joint statement issued by the Secretary of State and the Secretary of Defense, on June 4th, in the Girard matter, makes quite a point of reciting the protections contained in the agreement. You will not find any one of the Constitutional rights I have mentioned included in the rights recited in the joint statement.

No accused in Japan—in France—in Italy—in any foreign country—has such rights. There are other rights guaranteed by our Constitution which an accused may lose, depending to some degree on the country concerned, or the practical application of the laws by the court. These additional rights are: 1. A right to bail. 2. The right to be tried by a fair and impartial court. 3. The right to have a reasonable time to prepare his defense, after being informed of the charges against him. 4. The right to be present at his trial. 5. Protection against double jeopardy. 6. Protection against ex post facto laws. 7. Protection against bills of attainder * * *.

Under its Constitutional power Congress enacted a Uniform Code of Military Justice, providing a uniform code of procedure for the trial of military personnel, wherever they may be serving. The NATO Status of Forces Agreement as a treaty, and the other agreements without treaty standing, have substituted for the uniform procedure provided by Congress as many different systems of criminal laws and procedures as there are agreements. We, therefore, have two classes of servicemen and penalize the man who serves abroad for his service. The idea has been advanced that a man in military service lost his Constitutional rights when he entered military service. It is true that they may be slightly abbreviated by the Constitution itself, but that is no excuse for wiping them out completely by these status of forces agreements. In the Uniform Code

of Military Justice, Congress has carefully spelled out most of the rights which I have enumerated—so that all servicemen shall be treated alike.

The status agreements also contravene a rule of International Law of long standing—that the armed forces of a country stationed by consent in another country are not subject to the laws of the visiting nation. This is a legal proposition which can be supported by authorities going back to biblical days * * *.

It is obvious that our armed forces are no longer a symbol of the dignity of the United States. We "lost face" when we surrendered jurisdiction over our soldiers to Japan * * *

There is every indication now that our representatives who engineered this arrangement with Japan were somewhat inept, although the official admission has been slow in coming from any Executive Department. The General Counsel, Department of Defense, appearing before a subcommittee of the Senate Armed Services Committee on June 5, 1957, admitted that the official minutes agreed upon by our representatives at the same time as the protocol amending the Administrative Agreement, really gave a Japanese court the right to say when an American serviceman is on duty. The real facts have, therefore, never been given the American people.

For several years representatives of the State Department and the Defense Department have been proclaiming our right to try our servicemen for offenses on duty. They were covering up the fact that Japan put something over on them—that the agreement really was that we have exclusive jurisdiction of our servicemen for acts and omissions while on duty—only after a Japanese judge has determined he was on duty.

We are all familiar, now, with other reasons given by defenders of the Status of Forces Agreements to justify their continuance. Some of these have become almost hoary clichés. It is as if a repetition of them will make them true * * *

Possibly the most ridiculous defense made for the NATO Status of Forces Agreement is that it is reciprocal. Tied in to this is the assertion that we want to try foreign servicemen on duty here, and therefore, must give up jurisdiction over our troops abroad. We have over a million men serving abroad. The best estimate obtainable from the Defense Department is that not more than three or four thousand foreign servicemen, from all the nations combined, are in this country at any one time * * *

The claim that we want to try foreign servicemen in our courts is accompanied by the bogey of murder, rape, arson or some other very serious offenses by mobs of servicemen * * * When we have large numbers of foreign troops in our country, it will not be to defend us. They will be warring on us * * *

It is scarcely necessary to repeat the facts concerning the incident involving Girard in Japan, even though the facts have been garbled and changed from time to time to meet the needs of explanations by the Executive Departments. The truth stands out clearly—Girard was on duty when the incident occurred. The Commanding Officer of Girard's division certified this under the agreement. The government conceded the fact in the court proceeding. If he exceeded his instructions in any way while on duty, he is subject to courtmartial by our military authorities. I am ashamed of the means so far employed by both the Defense and the State Departments to attain their ends in this case * * *

There is no question but that a mistake was made in the first instance by someone in the Defense Department in instructing Admiral Hubbard to announce his decision to surrender Girard to Japanese justice. What followed is a new low in American fair play and justice. We have a joint statement issued by the two Secretaries on June 4, in which they try and convict Girard without a hearing in order to justify their decision again, to turn him over to the Japanese. All that is missing from their condemnation is the exact crime of which he is convicted. This is then

followed by news leaks emanating from officials of the Defense Department and others, all calculated to smear Girard and to condition the American people to the acceptance of the foreign trial as being Girard's due. Finally, we have the Secretary of State filing in a court of justice his affidavit seeking to influence the court in its decision. He was not only trying to speed up the course of justice, he was actually trying to frighten the court with the dire consequences of rendering a decision contrary to what the "powers that be" demanded. This was an uncalled for and unprecedented action—done solely for the purpose of exerting all pressure possible on a Judge of the United States District Court.

Earlier, in the same case, the Secretary had filed an affidavit made the same day as the one filed later, in which he asked to be excused from responding to a subpoena on the ground that he had no personal knowledge of the case. Such conduct is deplorable and sickening to anyone who has regard for our system of jurisprudence. Perhaps the Secretary would like everyone to forget, too, that the only reason we have had this so-called international incident is because our diplomats were too incompetent to negotiate agreements with other nations that would preserve the rights of the United States and its citizens. Our diplomacy has reached a sad state when it must base all of its decisions on the whims of agitators and demonstrators of other nations.

One sop handed to the American people, in the Joint Statement of the Secretaries, was that Girard would receive a fair trial, and if he did not—then they would take it up diplomatically. Since the diplomats have been powerless so far—what could we expect of them later? The issue has never been whether he will receive a fair Japanese trial—it is whether the Japanese should try him at all. I have already told you what constitutional rights any accused serviceman can lose in a foreign court. It follows, I think, that no American citizen will have a fair trial in any foreign court where he is deprived of these rights.

The persons who prepared the joint statement, and have since been putting out praise of Japanese justice, should read some of the reports of the official observers of trials in Japan. These reports have shown the complete failure of interpreters in translating English to Japanese or vice versa; proceedings dragging out over weeks or months, copies of charges not furnished to the accused until the opening day of trial; changes or substitutions of judges during trial; convictions on written statements of witnesses taken before trial without cross-examination, and other items not countenanced in our jurisprudence.

The observers in one case said that the three accused servicemen had not received a fair trial and stood unjustly convicted. They further said the testimony offered was not only preposterous and fantastic, but in some respects patently impossible. This was the case in which General Hickman told the Senate Armed Services Committee in February 1956, appeal even to the highest jurisdiction in Japan had not cured the original defects in the trial amounting to a denial of justice.

Our diplomats didn't work a cure either. In view of these various reports—it is a false and studied misrepresentation for the Executive Departments to be lauding Japanese justice in their public pronouncements. Girard has been getting the headlines recently, but other Americans have suffered without benefit of the sympathy of Americans. For several years Japan has had in her prisons two-thirds of the total number of American servicemen serving prison sentences worldwide.

On October 31, 1956, the Headquarters of Far East Air Forces found it necessary to issue a warning to all personnel in Japan, as to the practice of bringing criminal indictments against United States personnel for injuries to Japanese nationals arising out of motor accidents. I have a copy of that warning. It states that the purpose of the letter was to keep airmen from joining the ranks of United States personnel then in jail. It strongly advised calling on the victim or his family to expresse sympathy and de-

liver flowers or fruit. Courts take this into consideration, and if it is not done, impose greater penalties.

Our servicemen in other countries have been subjected to about the same perils of justice as those in Japan. Most of the NATO countries have a system of laws based on the civil law and procedures are much the same * * *.

A French expert has said: "The code exists to protect society from the criminal, not to protect the criminal from judicial error. We run our courts to convict the guilty, not to acquit the innocent."

Yet there are some who will still argue that there is a presumption of innocence of the accused in foreign courts!

The practice of combining a civil claim for damages with a criminal prosecution is common in many countries. This gives the prosecuting witness a financial stake in securing a conviction. It results in more criminal charges being made in order to support the civil claim. The French have had such trials—after waiving jurisdiction to the United States—because a civilian came forward and wanted to press his claim. It has disturbed the morale of our troops, according to the American Commander in France.

Appeals are perilous in foreign countries because the procedure amounts to double jeopardy. The Court has the right to increase the sentence. Appeals are taken by the prosecution for the sole purpose of accomplishing this—and, some courts consider an appeal by the prosecutor to be a mandate for such an increase.

Now, just a word about the statistics kept by the Defense Department and the conclusions that are drawn as to the large percentage of waivers obtained from foreign countries. One very important statistic is not available. That is how many of these servicemen, who were presumably charged by foreign authorities who subsequently waived jurisdiction, were actually tried by American court-martial? Until there is more information, I think we should assume that we do not have so many criminals in

the ranks of our armed forces, and that most of these statistics have been built up on inconsequential or fraudulent charges. Furthermore, waivers are not so readily given when a foreign country sees an opportunity to prosecute a serviceman for anything serious or remunerative.

The Defense Department spends considerable time in trying to make the picture look good. When the American Legion Magazine published the story of two servicemen who had been imprisoned in Japan, the Department immediately staged an investigation to discredit the article. The report of this investigation— of conditions they should have known without such proceeding—was a combination of corroboration, misrepresentation and plain falsehood * * *.

When hearings were held by the House Foreign Affairs Committee on my resolution offered in the last Congress, many efforts were made to fix the responsibility. Executive Department witnesses pretty well evaded the issue. Mr. Murphy, speaking for the State Department, remembered principally the emotionalism in France and Japan.

I am afraid this sensitivity to criticism, as expressed in staged demonstrations, is going to bring another sacrifice on the altar of diplomacy. The Formosa incident revealed that negotiations were pending with the Chinese Nationalist Government for a status of forces agreement. When I asked Secretary of State Dulles, by letter, if it was proposed to surrender to the Chinese Nationalists the criminal jurisdiction we now have over our forces, I received the reply which I have here.

There is a prime example of diplomatic deception—the use of the word "favorable" in the last sentence. Why didn't he say: "it is our purpose to obtain jurisdictional provisions as 'unfavorable' to the United States as those contained in the agreements we have already concluded with our principal allies throughout the world?"

We know that is what we are going to get if our diplomats have their way which is to continue to ignore the definite command of the Senate to not use the NATO Agree-

ment as a precedent. There is nothing favorable about any agreement we have today that surrenders jurisdiction over our troops to other nations. No amount of diplomatic jargon will make them so * * *.

Unfortunately, a feeling of resignation has developed among some who are acquainted with these agreements—possibly because the proponents of the agreements have adopted a fright argument—that any attempt to secure a modification of them will destroy our foreign relations—that we will be forced to give up our program of world security and withdraw our troops from foreign lands. It is also said that this means abandoning the world to the Kremlin. So anyone who favors my resolution is assumed to be in league with the communists.

Admittedly, it is more difficult to reclaim a right you have thrown away than it is to retain it against efforts to take it from you.

But there is no reason to say it cannot be done, when no one has made the effort. And no reason to continue to give away our rights because we are bent on demeaning ourselves further in the world.

Consider Formosa. The Chinese Nationalists are practically our wards. Without our continued support the government could not exist. We know full well the animosity that exists on that island against us. It was well demonstrated in the rioting and destruction of our property. Should we now reward that government by giving them jurisdiction of any kind over our troops? Should our servicemen be exposed to the obvious peril of prosecution in their courts? That is what the State Department is about to do.

I think it is high time we find out who our friends really are in the world. If any nation is so doubtful of our integrity and ability to try and to punish our men for wrongdoing, and so unfriendly as to refuse us this right—then I question their friendliness and whether they will support us in a pinch. We should not submit our servicemen to

trials in their courts because of this unfriendliness and animosity. We have no guaranty that if the time should ever come when we would really need the base or facility we are using, that it will not then be snatched away from us by an unfriendly nation. We may only be building up installations and equipment around the world for the future use of our enemies * * *.

Less than two weeks ago I was one of a group of Congressmen who were privileged to have breakfast with the President. I recall that he said it was necessary that all Republicans support and carry out the aims and purposes expressed in the Republican platform, adopted at the Convention at San Francisco. He further said that he would back any member who was backing that platform. Let me quote you one of the promises in that platform:

> "We maintain that no treaty or international agreement can deprive any of our citizens of constitutional rights. We shall see to it that no treaty or agreement with other countries attempts to deprive our citizens of the rights guaranteed them by the federal Constitution."

Appendix VI

Statement of Senator John W. Bricker made on the Floor of the United States Senate re the NATO Status of Forces Treaty. This statement also appears in the Report of a Supplementary Hearing held before the Senate Foreign Affairs Committee, on July 24, 1953.

The NATO Status of Forces Treaty would subject members of the United States armed forces to trial in the courts of NATO countries for nonmilitary offenses committed within those countries. As the Under Secretary of State, Gen. Walter Bedell Smith, conceded at the hearings (Record of Hearings, p. 53), the proposal is "unprecedented." Believing that this unprecedented agreement reflects a callous disregard of the rights of American armed forces personnel, I shall propose the following reservation:

> "The military authorities of the United States as a sending State shall have exclusive jurisdiction over the members of its force or civilian component and their dependents with respect to all offenses committed within the territory of the receiving state and the United States as a receiving state shall, at the request of a sending state, waive any jurisdiction which it might possess over the members of a force or civilian component of a sending State and their dependents with respect to all offenses committed within the territory of the United States."

The proposed reservation affects only the criminal jurisdiction in article VII of the Status of Forces Treaty. In my judgment, the other provisions of that treaty should be approved.

* * *

At the outset, I wish to make one fact absolutely clear. Nothing in the proposed constitutional amendment sponsored by 63 other Senators and myself would prevent the United States from becoming a party to a treaty like the NATO Status of Forces Treaty.

* * *

To approve the criminal jurisdiction provisions of this treaty would amount to penalizing the American soldier in an effort to please our NATO allies. Of course, I attribute no such motive to the President, to the Secretary of State, or to any member of the Senate Foreign Relations Committee. Nevertheless, that is the effect of the treaty before us.

Moreover, I do not criticize any member of the Foreign Relations Committee for not exercising due care and diligence in reporting this treaty favorable to the Senate. In the light of statements made by Government witnesses at the hearings, the committee's action was sound and logical. Unfortunately, the committee's action was based on false and misleading representations. As to whether the misrepresentations were deliberate or grounded in stupidity, I express no opinion.

The Fundamental Fallacy

The crux of the matter is what rights can properly be claimed for American servicemen abroad under generally accepted rules of international law. The Senate Foreign Relations Committee was informed by the Legal Adviser of the State Department, Herman Phleger, as follows:

> "Now with respect to the statement * * * that as a sovereign Nation we are now subject to the sovereignty of any country in which our troops are located, I do not view that as a correct statement of the law * * *."
>
> "Individuals wearing our uniform and part of our military force do not have sovereign immunity, and there is no doctrine which says that a nation which has on its soil representatives of a foreign nation must give immunity to those persons. Immunity is restricted to those which the receiving nation chooses in the handling of its diplomatic affairs to give immunity to, such as Ambassadors, and so forth." (Record of hearings, p. 49.)

Believing this to be an accurate statement of international law, the Senate Foreign Relations Committee might reasonably have concluded that the Status of Forces Treaty was the best bargain that could have been made under the circumstances. Mr. Phleger, however, was dead wrong. His statement to the committee reveals his total lack of experience in the field of international law.

The rule of international law as laid down by Chief Justice John Marshall and many other later authorities is that troops of a friendly nation stationed within the territory of another are not subject to the local laws of the other country, but are subject only to their own country's laws and regulations for the government of the armed services.

The Specious States Rights Argument

To shore up his case for the criminal jurisdiction provisions of the treaty, Mr. Phleger resorted to a specious States rights argument. For example, he advised the committee:

> "Now, when these (treaties) were under consideration the question was, Will the United States surrender its sovereignty? Will the United States agree that if a French soldier goes into the city of Richmond and gets drunk and kills a citizen of Virginia that the court-martial proceeding shall be the exclusive remedy before a French court-martial? We could not conceive the negotiators, that this Senate or the United States would ratify any such treaty * * *" (record of hearings, p. 56).

The Senate Foreign Relations Committee appears to have accepted Mr. Phleger's States rights argument. For example, reference is made on page 15 of the report to the undesirability of "depriving" State courts of jurisdiction except in certain cases. Here, again, Mr. Phleger was 100 percent wrong. When armed forces of foreign countries are invited to come to the United States, it is not a question

of depriving the States of jurisdiction over their non-military offenses. The States have no such jurisdiction unless it be conferred by the United States with the consent of the foreign power.

A Strange Quid Pro Quo

Perhaps the most fantastic argument advanced by Mr. Phleger is that the criminal jurisdiction provisions of the treaty constitute a good bargain. This is Mr. Phleger's statement before the Senate Foreign Relations Committee:

> "I have no doubt when these negotiators sat down, the objective which the United States negotiators had was get the maximum of jurisdiction over its own force while abroad, tempered, however, by the realization that if they acquired that abroad they would have to grant it in the United States, and I cannot see the possibility of the United States Senate agreeing that if a foreign soldier on United States territory, not in the performance of his duty, were to commit a crime, that the foreign military force could try him, and the civilian courts would have no jurisdiction. That, to my mind, cannot be considered" (record of hearings, p. 26).

The committee accepted, uncritically I fear, Mr. Phleger's assertion that a hard bargain had been driven. For example, on page 11 of the committee report, this statement appears:

> "The committee would not look with favor upon a complete surrender of criminal jurisdiction over foreign troops in the United States to a foreign power."

Why not? Let us refer back to Mr. Phleger's example of the French soldier who gets into trouble in Richmond, Va. It is at least 100 times more likely that an American soldier will get into trouble in France. The hearings disclose that only about 3,000 NATO troops are in the United States at any one time. How can anyone seriously believe

that the American people would rather have criminal jurisdiction over foreign troops here than to have 100 times that number of Americans overseas tried by their fellow Americans under the laws prescribed by their representatives in Congress. Americans in Richmond will gladly turn over the French soldier to his commanding officer when they realize that Americans in Marseilles will thereby be kept out of the court of a Communist judge. To trade a dollar for a penny is not a good bargain, Herman Phleger to the contrary notwithstanding.

Other arguments strange to American ears were advanced for their weird bargain. General Smith said that we must "reduce the administrative burden on the troop commander" (record of hearings, p. 3). In my judgment, any good commander knows that the morale of his troops far outweighs the administrative burden of insuring them a fair trial. In addition, Congress has appropriated large sums of money to send officers through law school. Their services should be utilized to give all members of our Nation's Armed Forces, here and abroad the best possible type of military justice.

Messrs. Smith and Phleger also argued that failure to give foreign countries criminal jurisdiction over American troops would jeopardize the maintenance of friendly foreign relations. That is hard to believe. American servicemen are stationed in Europe to defend that soil against overwhelming odds. If the host countries cannot find the manpower for their own defense out of a population greater than ours, if they cannot pay the full cost of maintaining their own forces, if they cannot exact from their forces the same military service we demand of ours, then surely they will not refuse to contribute to the common defense effort by permitting the trial of Americans by Americans. But if their hostility toward America runs so deep, which I doubt, that is an additional reason for not submitting American forces to trial in their courts.

As pointed out in the committee report, page 11, "The United States cannot demand treaty rights for its troops

abroad that it is not willing to accord to foreign troops here." Equality of treatment is provided in the reservation I have proposed. The military authorities of the United States would exercise exclusive criminal jurisdiction over American forces abroad. The same right is recognized with respect to the troops of other NATO countries in the United States. That is the bargain which should have been made originally. It is the only bargain consistent with the legal rights of American servicemen, with generally recognized principles of international law, and with the harsh realities of international relations.

The Secret and Illegal Executive Agreements

The Constitution of the United States provides that Congress shall have power "To make rules for the Government and regulation of the land and naval forces" (art. 1, sec. 8, clause 14). That power applies to forces outside the continental limits of the United States. Congress exercised its constitutional authority. The executive branch of the previous administration flouted the Congress' exercise of its constitutional power by making secret executive agreements. Under these agreements some NATO countries are already trying American servicemen for nonmilitary offenses. Although Mr. Phleger was not responsible for making these secret executive agreements, he defended their legality by citing the President's power as Commander in Chief (record of hearings, p. 66).

This is not a case where the President's action, though unauthorized, was not prohibited by the Congress. The executive agreements surrendering American servicemen to the local courts of NATO countries are in direct violation of the congressional exercise of power to make rules for the regulation of the land and naval forces.

As indicated in the report of the Senate Foreign Relations Committee (p. 5), the Uniform Code of Military Justice permits any offense against the law of the country where troops are stationed to be treated as an offense

against the code. Article 2, paragraph 1, of the code provides that all persons belonging to a regular component of the Armed Forces are subject to its provisions. Article 5 provides that the code shall be applicable in all places.

• • •

What stronger evidence could there be of Congress' intent to make the code applicable to every American serviceman wherever stationed?

• • •

Now we come to the most startling argument of all in favor of the criminal jurisdiction clauses of the Status of Forces Treaty.

According to General Smith, the Senate should approve the treaty because it confers more rights on American servicemen than the secret and illegal executive agreements made by the previous administration (Ex. Rept. 1, pp. 12, 13). There is more to this bootstrap-lifting argument. According to General Smith and Mr. Phleger, if the treaty is not ratified as written, Americans will be turned over to local authorities for trial with even less protection than that provided in the treaty (Record of hearings, pp. 30, 44-45). Never in my experience as a United States Senator have I heard a more brazen challenge to the constitutional authority of the Congress. The Senate is commanded, in effect, to lie down and roll over. I hope that the Senate will not only adopt the reservation I have proposed, but that the Senate Committee on Armed Services will do everything possible to rectify the illegal actions already taken in regard to the trial of American troops abroad.

DIPLOMATIC IMMUNITY FOR TOP NATO OFFICIALS; DOUBLE JEOPARDY FOR THE AMERICAN GI

It is shocking that the Senate should be asked to approve at this time a treaty (Ex. U, 82d Cong.) which confers diplomatic immunity on representatives of member states of the North Atlantic Treaty Organization, on members

of their official staff, on officials of the Organization, and on experts employed on NATO missions. All these individuals will enjoy varying degrees of immunity from personal arrest or detention. All of them have undertaken their work voluntarily; they receive high salaries; and many of them are exempt from income taxation. Some of the persons who will enjoy diplomatic immunity under the terms of the Organization treaty no doubt helped to draft the criminal jurisdiction provisions of the Status of Forces Treaty.

Contrast the diplomatic immunity conferred under one treaty with the double jeopardy authorized by the other. The average American subject to the Status of Forces Treaty would prefer not to be in military service; is not enjoying any high or tax-free salary; and is not likely to survive if the Soviet Union moves against NATO forces in their present condition of readiness. The discrimination cannot be defended.

Although the committee report refers to safeguards against double jeopardy (p. 5), Mr. Phleger conceded that double jeopardy was possible. (Record of hearings, p. 48.) On this point, Mr. Phleger is right. Article VII, paragraph 8, of the treaty cannot be interpreted in any other way.

* * *

In the negotiation of the treaty, it would appear that the American GI was completely forgotten in the pursuit of global abstractions. This colloquy at the hearings is quite illuminating:

> "Senator Ferguson: Do you not think there is a difference between a situation where citizens voluntarily go to a foreign country, and a situation where men are drafted into military service or voluntarily go into military service, and then are sent as an army to a foreign land?
>
> "Mr. Phleger: I do not see that that distinction, if it is one, is applicable here" (record of hearings, pp. 55, 56).

If Mr. Phleger is still unable to see the difference between an American who goes abroad voluntarily for reasons of business or pleasure or an American drafted into the Army and ordered overseas to defend foreign soil, he is not qualified to be the State Department's Legal Adviser.

A Precedent for the Benefit of Communism

It is my judgment that United States approval of the criminal jurisdiction article of the Status of Forces Treaty would be of immense benefit to the Communist cause. The reason is that the United States must treat all its partners in the fight against Soviet communism equally. At the same time, it is unthinkable that American lives should be entrusted to the jurisdiction of every nation outside the Iron Curtain.

In his prepared statement before the Senate Foreign Relations Committee, General Smith said, "This is a rather precedent-making request" (record of hearings, p. 2). It is indeed, even though General Smith later said the treaty should have been described as unprecedented. It is that, too. General Smith, however, made it abundantly clear that approval of the treaty would establish a precedent, and one which could be broken only at the cost of alienating potential allies in the fight to stem Communist aggression.

No one denies that approval of the treaty would establish a precedent with respect to Japan. The United States is already obligated to surrender the same criminal jurisdiction to Japan that it surrendered to the NATO countries. Is there a Senator among us who can describe criminal law and procedure as it actually operates in Japan?

* * *

Membership in NATO does not mean that all members recognize the same degree of civil and political liberty. Not even Clarence Streit, head of the Atlantic union move-

ment, contends that all NATO countries are so alike as to make a political union of all of those countries feasible. He would exclude from Atlantic union, as not sufficiently housebroken, Greece, Turkey, and several other NATO members.

References were made in the hearings to certain countries in the Middle East where the punishment for theft is to cut off the hand of the offender (record of hearings, pp. 50, 52). Surely no one wants to subject American servicemen to such cruel and inhuman punishment. But how can that be avoided if the treaty before us is approved without reservation? Is General Smith going to tell countries of the Middle East that they are not genteel, or that their system of justice is inferior to that of the NATO countries? I think not. The Middle East is too important to be thrown into the arms of the Communists. We have no alternative but to treat all nations on the same basis so far as jurisdiction over American troops is concerned.

Not being in the State Department, I have no hesitancy in saying that Marshal Tito is not housebroken. But can General Smith say the same? Of course not. If there is any hope of making Tito a trustworthy ally; the State Department cannot make any invidious comparisons between the Yugoslav and Italian judicial systems.

At the present time the United States has military forces stationed in about 40 countries. Are we to tell all but 14 of those nations that they are not genteel, not housebroken? The probability is that rather than alienate their friendship we would subject American boys to their criminal jurisdiction no matter how bizarre or inhuman by our standards.

For this dilemma, there is a very simple remedy. The United States can treat all nations alike by standing on the generally accepted principles of international law which it has followed for more than 150 years.

Americans as a Special, Privileged Class

One argument for approval of the Status of Forces Treaty is more disturbing to me than any other. On pages 11 and 12 of the committee report, this statement appears:

> "*Exclusive criminal jurisdiction, amounting to* extraterritoriality, itself creates difficult problems. In the eyes of the local population, it sets Americans apart as a special, privileged class, and this fact acts as a constant irritant * * *. Regardless of how fair and just American courts-martial may be, the existence of exclusive criminal jurisdiction seems to the other country to be an infringement of its sovereignty."

So long as Americans insist on a higher standard of civil and political rights than their neighbors, they will, to that extent, seem to stand alone as a special, privileged class. The contrast would not be so great, of course, if Americans were willing to accept European concepts of freedom. Even in trials before courts-martial, Americans are guaranteed the presumption of innocence; protected against cruel and inhuman punishment; convicted only on proof of guilt beyond a reasonable doubt; granted the privilege against self-incrimination; and granted the rights to various appeals, even up to the President of the United States. None of these safeguards for American forces are guaranteed by the Status of Forces Treaty.

The proposed treaty does not even give the accused the right to public trial. In fact, such a right is denied by implication in article VII, paragraph 9 (g), providing that the accused shall be entitled "to communicate with a representative of the government of the sending state and, when the rules of the court permit, to have such a representative at his trial."

Thus, it is clear that under certain circumstances even representatives of the accused's commanding officer may be excluded from the trial.

It is true that the Uniform Code of Military Justice does not guarantee any right to a public trial. But the American tried by courts-martial is tried by Americans. He is surrounded by numerous safeguards provided by Congress. In liberalizing court-martial procedure by enacting the Uniform Code Congress created a Court of Military Justice, on which three distinguished judges are now serving. Congress has the power to improve the code at any time it sees fit. But if the Status of Forces Treaty is approved without reservation, neither Congress nor the President can correct an injustice done to an American serviceman. The treaty cannot even be denounced until 5 years after ratification.

It is not enough merely even to look at excerpts from the constitutions and laws of other countries. Many fine phrases are qualified by other provisions effective in national emergencies proclaimed by the authorities. There is not one United States Senator who really knows the type of trial given to persons accused of crimes in all the NATO countries and Japan.

The hearings do not mention how prisoners are treated in NATO countries and in Japan. We know that confinement by our own military authorities takes place under conditions that are humane and sanitary. Will the Senate Foreign Relations Committee certify to the American people that the same conditions prevail in the penal institutions of NATO countries and Japan?

If Americans, by reason of their unique respect for fundamental human rights, are a special or privileged class, they have not shirked their responsibility to people less fortunate. Billions of dollars have, for example, been poured into NATO countries. That contribution would have been impossible without the concept of freedom which distinguishes Americans from other people. Reasonable and honest men may differ in regard to the number of dollars Congress may give away with safety. But to give away the rights of Americans serving in the uniform of their country is unthinkable.

Appendix VII

Extract from Report of Hearings held before Subcommittee of the Senate Committee on Armed Services, March 29th, 31st and June 21st, 1955:

* * *

Senator Flanders. I am just raising at this time the question, if treaty authority was required for the NATO countries, what the authority was for other arrangements made with other non-NATO countries.

Mr. Leigh. We had agreements of course before the Status of Forces Treaty came into effect or before it was negotiated and my understanding has been that they were generally negotiated under the theory that the President had power as Commander in Chief to make the necessary arrangements for troops abroad.

But you will find an enormous range of arrangements in this field. Some have the positive sanction of Senate approval. Others have what I might call the Japanese situation. And others are much less formal.

Senator Flanders. As you know, this question of treaties, executive agreements, et cetera, is something about which the Senate has expressed a great deal of interest from time to time, and I was just anxious to get onto the record the statements of the points of view of the Defense Department as to the authority in making these arrangements in non-NATO countries.

Do I understand from what you have just said that you would generally feel that the President had the authority to make such arrangements?

Mr. Leigh. That was my understanding of the theory on which those arrangements were made.

Senator Flanders. But then following through on that same theory would it be your understanding that the NATO cases were incorporated in that treaty so that in connection with those countries at least there should be no question raised?

Mr. Leigh. My understanding, Senator Flanders, was that the NATO Treaty was a comprehensive document covering a great many arrangements besides jurisdictional arrangements for our troops. * * *

Appendix VIII

Testimony of Major General George W. Hickman, Jr., Asst. Judge Advocate General U. S. Army respecting the operation of the NATO Status of Forces Treaty in Turkey. (Japan has similarly interpreted and acted on the Administrative Agreement):

Although our military operations under the Status of Forces Agreement have progressed satisfactorily; the Turks have interpreted the Status of Forces Agreement as vesting in the courts of Turkey final authority to determine whether offenses committed by members of the United States forces actually occurred during the performance of official duty. Although the Status of Forces Agreement does not specify who shall have the authority to make a final determination as to such matters, it is the position of the Department of Defense, based upon the minutes of the NATO working group which drafted the SOF Agreement, that such determination should properly rest with the authorities of the sending state.

However, Turkey has not done so. I have a case just somewhat illustrative of the point.

There was an Air Force sergeant who on April of 1953 was driving a jeep in connection with the motion-picture service in Ankara, Turkey; when he struck and injured a pedestrian. As a result of the accident, the sergeant was charged by the Turkish authorities with reckless driving.

A preliminary hearing was not held until about 8 months later, at which time trial in the Turkish courts was set for sometime in March. In the Turkish proceeding they bite off a little bit of the trial at one time and they adjourn for a week or two, and then they call all the witnesses and they come back and bite off another little section of the proceedings, and so on, until they finally get it finished. That is the Turkish system.

Sentence in this case was imposed on the 1st of November 1954. The sentence was to 3 months confinement, and a fine of 500 Turkish lira. However, the entire sentence was suspended. We are informed that the United States Embassy initiated a request that the sergeant leave Turkey within 24 hours of the sentence.

But a great deal of the delay prior to the trial was occasioned over the squabble about the official duty status of the sergeant, who at the time of the offense was working for extra pay for the Armed Services Motion Picture Service after his normal duty hours. The Turks said it wasn't official duty. We said it was. They won.

The joint military authorities have reported that jurisdiction arrangements in Turkey have had an adverse effect upon the morale of the United States forces due to the delays in investigations and trial. These delays result in frequent absence from duty station of the accused and of other personnel concerned with the proceedings, those that are monitoring the proceedings and those there as witnesses. An investigation is presently being conducted to determine what steps can be taken to remedy this situation.

An informal report from our judge advocate with the joint group in Turkey indicates that it is all part of the Turkish system. They are not indicating discrimination against us. The judiciary is completely independent of the executive department, and once they get a case, it is theirs, and they will brook no interference. Furthermore, they have that system that I mentioned a little earlier of getting all the witnesses in and hearing all they can one day and then adjourning until 2 or 3 weeks later, taking up the next phase of the case.

Appendix IX

Affidavit of Robert Dechert, General Counsel, Department of Defense, Respecting Status of Camp Weir Area.

IN THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

H. C. 47-57

—o—

WILLIAM S. GIRARD United States Army Specialist 3/C,
Petitioner.

vs.

CHARLES E. WILSON Secretary of Defense et al.,
Respondents.

—o—

AFFIDAVIT WITH RESPECT TO MANEUVER AREA

COMMONWEALTH OF VIRGINIA
COUNTY OF ARLINGTON } ss.:

ROBERT DECHERT, being first duly sworn, deposes and says:

I am the General Counsel of the Department of Defense. The following information has been received through official channels regarding the Camp Weir Maneuver Area.

The Camp Weir (known by the Japanese as Somagahara) Maneuver Area was used by the Japanese Army before and during World War II. It was seized by the United States Forces on or about April 11, 1946. The area was formally obtained by procurement demand on the Imperial Japanese Government No. 4219, dated October 20, 1951, which designated April 11, 1946 as the delivery date. The Japanese Government has paid rents to private owners of land in the area for the period 1946 until departure of the First Cavalry Division to Korea in 1950. For approximately one and a half years after departure of the First Cavalry Division the land lay idle. Local farmers began

encroaching upon the area during this period. On April 28, 1952, the Japanese Peace Treaty, Security Treaty and Administrative Agreement became effective. Under Article II of the Administrative Agreement, Japan agreed to furnish to the United States "facilities and areas" necessary to carry out the purpose stated in Article I of the Security Treaty. Paragraph 1, Article II of the Administrative Agreement provides in part:

"Agreements as to specific facilities and areas, not already reached by the two governments by the effective date of this agreement, shall be concluded by the two governments through the Joint Committee provided for in Article XXVI of this agreement."

At the time the Administrative Agreement became effective no agreement had been reached by the Japanese Government and the United States Government on the Camp Weir Maneuver Area. However, on July 26, 1952, the following agreement was reached by the Joint Committee:

"1. The facilities and areas the use of which is to be granted by Japan to the United States of America in accordance with Paragraph 1 of Article II of the Administrative Agreement signed at Tokyo on February 28, 1952, under Article III of the Security Treaty between Japan and the United States of America shall be as provided in the schedule attached hereto, except where indicated 'pending' in the schedule.

"2. It is confirmed that the facilities or areas indicated 'pending' in the schedule refer to those facilities or areas the continued use of which is to be granted to the United States in accordance with the notes exchanged between Mr. Katsuo Okazaki, Minister of State of Japan, and Mr. Dean Rusk, Special Representative of the President of the United States of America, at Tokyo on February 28, 1952. Negotiations with reference to these facilities or areas shall be continued between the two governments."

The Camp Weir Maneuver Area was designated as facility No. 3039 on the schedule referred to in the above

quoted agreement, furnished for indefinite use, but indicated as "pending." The notes exchanged between Mr. Rusk and Mr. Okazaki, referred to in the agreement quoted above, provided that facilities and areas used by the United States prior to the date of the Administrative Agreement would continue to be used on the same basis as used theretofore until either a formal agreement was reached on such facilities or areas or until such facilities or areas were released by the United States. No formal agreement has ever been reached on the Camp Weir Maneuver Area because the Japanese and United States representatives of the Joint Committee have not been able to reach an agreement on the exact boundaries of the area. The dispute over boundaries arises principally from the Japanese demand that areas encroached upon by local farmers be released from the maneuver area. At sometime in late 1951 or early 1952 the United States agreed to permit the National Safety Police (which later became the Japanese Self-Defense Force) to use certain portions of the Camp Weir Maneuver Area for an Artillery and Armored School. This agreement provided that the National Safety Police would be required to vacate the premises on 60 days notice by the United States. A new agreement containing the same sixty-day vacate notice provision was effected on March 30, 1954. This agreement was terminated effective October 15, 1954 by giving notice to vacate on August 12, 1954. Since the termination of this agreement the United States at the request of the Japanese Government has from time to time permitted the Japanese Self-Defense Force to use the Camp Weir Maneuver Area on a temporary basis. At the time of the Girard incident the area was being used solely by the United States Forces.

/S/ ROBERT DECHERT
ROBERT DECHERT
General Counsel
Department of Defense

Subscribed and sworn to before me this 11th day of June 1957. My commission expires: Dec. 29, 1959.

S E. W. HERL
Notary Public

(SEAL)

Appendix X

Directive issued by the Commanding General, Far East Air Forces, dated 31 October 1956, subject: Motor Vehicle Accidents Involving Death or Injury to Japanese.

HEADQUARTERS
FAR EAST AIR FORCES
APO 925

31 October 1956

SUBJECT: Motor Vehicle Accidents Involving Death or Injury to Japanese

TO: ALL FEAF Personnel in Japan

1. The Japanese Government has on numerous occasions brought criminal indictments against United States personnel, military and civilian, for injuries or death to Japanese Nationals arising out of motor vehicle accidents. These indictments allege violation of Article 211 of the Penal Code of Japan which provides in part as follows:

> "A person, who fails to use such care as is required in the performance of profession, occupation or routines and thereby kills or injures another, shall be punished with imprisonment for not more than three years or a fine of not more than one thousand yen."

2. This means that very high standards of skill and care in driving an automobile are required. It means that one may be convicted in criminal court and imprisoned in Japanese confinement facilities, for his part in an automobile accident, under circumstances such that in the United States he would not be considered negligent, or at fault, and would not be found criminally or civilly liable. Exceeding the speed limit, driving while under the influence of liquor or leaving the scene of an accident would no doubt

greatly aggravate any offense under Article 211. The existence of many automobiles in Japan is a relatively new phenomenon and many Japanese do not yet realize their danger. The purpose of this letter is to help you avoid joining the ranks of United States military and civilian personnel now in Japanese jails.

3. Recently an Air Force officer was sentenced to confinement in a Japanese prison for causing the death of a Japanese National through negligent operation of his automobile. The judge, in rendering judgment, commented that in determining sentence he had taken into consideration the fact that the officer had failed to observe the custom of visiting the family of the deceased and expressing his sympathy. Other cases have come to the attention of this Headquarters where this custom was observed by the American driver causing injury; observance considerably eased subsequent dealings between the parties concerned.

4. It is important to note that in Japan, unlike the situation in the United States, the above mentioned practice is not construed as an admission of liability or fault on the part of the person making the call. The caller should however refrain from making any comment to the victim or his family, as to responsibility for the accident. Where the individual causing injury is driving his private vehicle, he should if possible contact the local representative of his insurance company before visiting the injured person or his family, or taking other actions outlined in FEAF Regulation No. 30-1. Where, however the accident occurs on a Saturday, for example, and the insurance representative cannot be reached until the following Monday, there would generally be no objection to visiting the injured person or the deceased's family on a Sunday, taking fruit or flowers. Where money is later given (as with the approval of the insurance company) an appropriate amount might be be-

tween one and five thousand yen. It is noted that the insurance company normally will make no reimbursement for this money or other gifts.

5. Common courtesy and basic humanitarian principles, as well as the observance of proper American-Japanese relations, call for expressions of sympathy in situations mentioned above. FEAF Regulation No. 30-7, is to be used as a guide by all personnel of this Command who become involved in an accident resulting in death or serious injury to Japanese. Such persons should also contact the individual who has been appointed by the installation commander to give advice in such matters. The local office of the Staff Judge Advocate can give you his name.

BY ORDER OF THE COMMANDER:

/s/ C. H. POTTENGER
C. H. POTTENGER,
Brigadier General, USAF
Deputy for Personnel
and Administration

IN THE

Supreme Court of the United States

October Term, 1956

No. 1108

WILLIAM S. GIRARD, *Petitioner*

v.

CHARLES E. WILSON, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH S. ROBINSON
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IN THE

Supreme Court of the United States

October Term, 1956

No.

WILLIAM S. GIRARD, *Petitioner*

v.

CHARLES E. WILSON, Secretary of Defense; JOHN FOSTER DULLES, Secretary of State; WILBUR M. BRUCKER, Secretary of the Army; GENERAL MAXWELL D. TAYLOR, Head, Joint Chiefs of Staff; MAJOR GENERAL W. H. MAGLIN, Provost Marshall General, United States Army; GENERAL LYMAN LEMNITZER, Commanding General, Far East Command, United States Army, *Respondents*

PETITION FOR WRIT OF CERTIORARI, BEFORE JUDGMENT, TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States, Petitioner respectfully shows:

SUMMARY STATEMENT OF MATTER INVOLVED

Petitioner, a soldier in the United States Army, is currently held in custody in Japan by United States Army officers at the instance of the executive branch of the United States Government for the purpose of his being turned over to Japanese authorities for trial in a Japanese court for an act which the Commanding General of Girard's division certified and which the United States Attorney stipulated at the hearing was done in the performance of official duty.

On June 18, 1957, the United States District Court (Judge Joseph C. McGarraghy) filed an Opinion containing findings of fact and conclusions of law. An Order was entered thereon—only part of which was appealed from by the Petitioner to the United States Court of Appeals for the District of Columbia Circuit. The entire Order has been appealed from by the Respondents. Both appeals are now pending in the United States Court of Appeals for the District of Columbia Circuit. This application is for a Writ of Certiorari before judgment.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, U.S. Code.

QUESTIONS PRESENTED

The questions on appeal by Petitioner may be stated to be:

1. Is a person to be denied a Writ of Habeas Corpus although his detention has been found to be unlawful merely because he may possibly again be arrested and detained for other reasons or for a different purpose, and is declaratory or injunctive relief alone adequate and proper in such circumstances?

2. Is a person in our military service who is unlawfully detained by the military authorities to be denied relief by habeas corpus merely because upon release from confinement or detention he must continue to serve for the balance of his enlistment in the Armed Forces.

3. Other questions presented in the appeal by the Respondents involve the constitutionality and legality of the "Administrative Agreement", "Protocol", "Minutes of Protocol", and "Agreed Views" (all executed without the consent of the United States Senate) pursuant to which documents it was sought to deliver the Petitioner to the Japanese courts for trial; the constitutionality and legality of the attempted application of the provisions of said documents to the facts in this case by the executive branch of the United States Government; the power of the executive to make a political decision to waive away rights of a United States citizen and the authority of the United States Courts to judicially determine the propriety, legality and constitutionality of such executive action.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The questions presented upon the appeal by the Petitioner as well as the questions presented upon the appeal by the Respondents are of great importance and have not but should be settled by this Honorable Court.

CONCLUSIONS

This Honorable Court should, 1. Order Respondents to file response to this Petition within a reasonable time. 2. Grant the Writ of Certiorari. 3. Permit each side adequate and reasonable time for study and brieting of the various questions involved. 4. Because of the shortness of time, permit the Petitioner

to file in this Honorable Court copies of the mimeographed "Memorandum In Support Of Petition For Writ Of Habeas Corpus" which was filed in the United States District Court for the District of Columbia. 5. Affirm the Order of the United States District Court for the District of Columbia and modify same to the extent of directing the issuance of the Writ of Habeas Corpus.

WHEREFORE, Petitioner prays that a Writ of Certiorari issue under seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia Circuit commanding said Court to certify and send to this Honorable Court a full and complete transcript of the record and of the proceedings had in this case to the end that the Order insofar as appealed from by the Petitioner be reviewed and determined by this Honorable Court as provided for by the statutes of the United States; modification of the Order of the District Court to the extent of directing that the Writ of Habeas Corpus issue; and for such other, further, and equitable relief as this Honorable Court may deem just and proper.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1956

No. 1108

WILLIAM S. GIRARD,
Petitioner-Appellant,

v.

CHARLES E. WILSON, ET AL.,
Respondents-Appellees.

BRIEF FOR APPELLANT

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IN THE

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No. 1108

—o—

WILLIAM S. GIRARD,
Petitioner-Appellant,

v.

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Respondents-Appellees.

—o—

BRIEF FOR APPELLANT.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254(1) Title 28 U. S. Code. On June 21, 1957 a petition for Writ of Certiorari was granted and an order entered consolidating this case with *Wilson, et al.* v. *Girard*, No. 1103, October 1956 Term and assigning both cases for argument on July 8, 1957.

Summary Statement of Matter Involved and Questions Presented

Petitioner-appellant, a soldier in the United States Army, is currently held in custody in Japan by United States Army officers at the instance of the Executive Branch of the United States Government. Prior to the injunction order of the Court below he was held in such custody for the purpose of being turned over to Japanese authorities for trial in a Japanese court for an act, which

his Commanding Officer certified and which the United States Attorney stipulated at the hearing, was done in the performance of official duty.

On June 18, 1957 an order was entered in the United States District Court for the District of Columbia as follows: "ORDERED that in accordance with the opinion filed this date, the petition for Writ of Habeas Corpus is denied, the rule to show cause is discharged, and that respondents and those over whom they exercise command function be, and they hereby are, enjoined from delivering petitioner to the Japanese government."

On this appeal, review by this Honorable Court is sought on only so much of the order as denies the petition for Writ of Habeas Corpus and discharges the rule to show cause. By reason of the District Court's failure to grant the writ the petitioner is still held in custody although no charges of any kind have been filed against him and although he may not be delivered to the Japanese Government for trial by reason of the injunction which was issued.

The questions presented on this appeal may be stated to be:

1. Is a person to be denied a Writ of Habeas Corpus although his detention has been found to be unlawful merely because he may possibly again be arrested and detained for other reasons or for a different purpose, and is declaratory or injunctive relief alone adequate and proper in such circumstances?

2. Is a person in our military service who is unlawfully detained by the military authorities to be denied relief by habeas corpus merely because upon release from confinement or detention he must continue to serve for the balance of his enlistment in the Armed Forces?

POINT I

Whenever imprisonment or detention is unlawful a writ of *habeas corpus* should be issued and the possibility of further arrest or detention of petitioner for other reasons or for a different purpose is not material. (Title 28 United States Code, Chapter 153.)

The District Judge (Honorable Joseph C. McGarraghy), although finding and concluding that the detention of the petitioner was unlawful, stated that "since the petitioner remains a member of the United States Armed Forces in Japan and *may be prosecuted* in Court-Martial proceedings for the offense with which he is charged (by the Japanese), the petition for the writ will be denied and the Court will treat the complaint as a Petition for Declaratory Judgment and Injunction * * *." (Italics supplied.)

The mere fact that an individual *may be* brought to trial before another tribunal or may possibly be lawfully arrested or detained at some future time is not sufficient reason for denying a writ of *habeas corpus*. *Medley, Petitioner*, 134 U. S. 160. The error would probably not have been made by the District Judge were he not pressed to make a quick determination. The Honorable John Foster Dulles, Secretary of State, in his affidavit dated June 10, 1957, in support of a "Motion to Expedite Determination" filed June 17, 1957, urged that "every hour" in which the case remained undetermined "prolongs a source of international friction and may have adverse effect upon our relations with Japan and other countries." Mr. Dulles made no mention of the fact that the life of an American citizen was at stake and that the precedent here established may affect the lives of many Americans for generations to come. He pressed for a quick determination to prevent "great embarrassment to the Government

of the United States." If there be any embarrassment it was brought about by his own acts which were designed to bypass the Senate of the United States in contravention of the United States Constitution and in disobedience of the Senate's express mandate. (North Atlantic Treaty, Status of Forces Agreement, T. I. A. S. 2846.) In any event the alarmist views expressed by Mr. Dulles are without foundation in fact.

In *Medley, Petitioner, supra*, it appears that Medley was duly convicted of murder in the State of Colorado. After commission of the offense, a law was enacted by the Legislature of the State of Colorado, which inflicted greater punishment than was provided at the time the crime was committed. Obviously such law is *ex post facto* and, in its application to Medley, was unconstitutional. This Honorable Court ordered Medley released from custody and stated that it was not within its province to determine whether the petitioner could be or may be imprisoned under different laws or for other reasons. Faced with a practical problem, this Court ordered that the Attorney General of the State of Colorado be notified of the exact day and time the petitioner was to be released from custody so that he might take appropriate action but the writ of *habeas corpus* issued nevertheless.

The *Medley* case stands for the proposition that a *habeas corpus* writ must issue in the event the detention is found to be unconstitutional or unlawful and that the Court may not deny the writ merely because there may, in the future, be some other basis for detaining the petitioner. See also *Lowrey v. Hiatt*, 73 F. Supp. 8.

In *Ex Parte Orozco*, 201 F. 106, a writ of *habeas corpus* was issued on application of an alien who was detained by the military authorities "by direction of the President." The Court ruled that the President of the United States does not have any power or authority not specifically vested in him by the Constitution and Laws of the United States. The de-

cision reviews the authorities and concludes that the President of the United States has no right to hold any person in arrest and that he may not do so in the exercise of any so-called discretionary power. If the President, as the Chief Executive and the Commander-in-Chief of the United States Armed Forces, lacks such power, it follows that his subordinates likewise lack such power.

The continued detention of Girard in restraint, without charges being filed against him and after it has been judicially determined that he may not be turned over to the Japanese Government for trial, is unlawful and illegal. The writ of *habeas corpus* should accordingly issue. *Motherwell* v. *United States*, 107 U. S. 437, reversed on other grounds 183 U. S. 424; *Ex Parte Merryman*, Fed. Case No. 9,487; *Ex Parte Milligan*, 71 U. S. 2; *Tucker* v. *Alexandroff*, 183 U. S. 424.

POINT II

A person in the military service who is unlawfully detained by the military authorities may not be denied relief by *habeas corpus* merely because, upon release from confinement or detention, he must continue to serve in the Armed Forces.

Habeas corpus has always been considered as the appropriate remedy to test the legality of detention by military authorities and whether the petitioner be a soldier or a civilian is of no consequence. If he is unlawfully detained, his release from confinement must be ordered. *Martin* v. *Young*, 134 F. Supp. 204. It is release from the unlawful detention which the Writ of *habeas corpus* accomplishes and not release from the continued performance of military duty. Furthermore, if there is any doubt as to what is intended, the Court may make specific provision in its order

to the effect that the Writ does not release petitioner from continuing in military service. Title 28 U. S. Code 2243 provides that the Court may "dispose of the matter as law and justice require."

If, as in this case, petitioner is found to be unlawfully detained, he must be released and the denial of the Writ is not authorized merely because he must continue to serve in the military service or merely because there is the possibility that at some future day court-martial charges may be filed against him or he may be prosecuted in a court-martial proceeding. *Lowrey v. Hiatt, supra; Martin v. Young, supra.*

CONCLUSION

The appeal from so much of the Order of the United States District Court as denies the writ of *habeas corpus* should be reversed and the case remanded to that Court directing that the writ be issued, forthwith.

Respectfully submitted,

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Counsel for Appellant.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1108

WILLIAM S. GIRARD, PETITIONER

v.

CHARLES E. WILSON, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS *

OPINION BELOW

The opinion of the District Court has not yet been reported. The opinion and order of the District Court are printed as Appendix B (pp. 38a–51a) to the brief for the Petitioners in No. 1103, this Term.

JURISDICTION

The order of the District Court denying the petition for a writ of habeas corpus but granting declaratory relief and an injunction was entered on June 18, 1957. Petitioner appealed to the Court of Appeals for the District of Columbia from that part of the order

* This brief deals only with the narrow issue raised in petitioner Girard's brief in this case, No. 1108. The major issues involved in this litigation are dealt with in the brief of petitioners (respondents here) in No. 1103, this Term.

which denied the petition for a writ of habeas corpus. After respondents had sought certiorari before judgment in the Court of Appeals on their appeal, petitioner also sought certiorari before judgment on his appeal. Both petitions were granted on June 21, 1957, and the cases consolidated for argument. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether it was error for the District Court, upon ascertaining the nature of petitioner's contentions and the relief desired, to refuse to order petitioner's outright release, to treat petitioner's application for a writ of habeas corpus as an action for a declaratory judgment and injunction, and to fashion relief accordingly.

STATUTE INVOLVED

28 U. S. C. 2243 provides:

> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
>
> The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
>
> The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

STATEMENT

In his petition for a writ of habeas corpus, filed on June 6, 1957 (Appendix, *infra*, pp. 15–19), petitioner alleged that he was in the military service of the United States, and that on or about January 30, 1957, he had been arrested and thereafter held in confinement for the purpose of being delivered to the government of Japan for trial. Claiming that he could not validly be turned over to the Japanese government, petitioner sought his production before the court to inquire into the validity of his restraint and "such other further and equitable relief" as the court should deem proper.

Respondents in their return (Appendix, *infra*, pp. 19–22) alleged *inter alia* that petitioner's term of enlist-

ment was not due to expire until October 27, 1957[1] and that petitioner was "on a normal duty status restricted by military orders to the military base of Camp Whittington." At the hearing petitioner did not claim that he was entitled to be released from the army and did not contend that he would not be subject to trial by court-martial. His basic contention was that it would be a violation of his rights to allow the government of Japan to try him in its courts.

The District Court held that the administrative restriction of petitioner to the limits of the camp was sufficient restraint for the purposes of habeas corpus, but that, since petitioner would remain a member of the United States armed forces in Japan and might be prosecuted in court-martial proceedings, the petition for the writ of habeas corpus would be denied. Treating the petition as one for declaratory judgment and injunctive relief, the court enjoined respondents

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[1] Petitioner, while at all times stating that he was in the military service, originally alleged that his last term of enlistment had expired on February 12, 1957. That claim was dropped in his Reply to Return and Answer to the Rule to Show Cause (Appendix, *infra*, p. 22), which stated that it was on that date that he was to have been returned to the United States (presumably for rotation). In this Court, both the petition for certiorari in No. 1108 and the petitioner's brief agree that petitioner is currently a soldier in the United States Army and make no issue over any alleged termination of his enlistment or any obligation to be returned to the United States on rotation or otherwise. His service record shows that his enlistment in the Regular Army will expire on October 27, 1957. See the petition for a writ of certiorari in No. 1103, Appendix C, p. 54a, and Government Exhibit No. 3 in the record in that case.

from delivering petitioner to the Japanese government.

SUMMARY OF ARGUMENT

In this proceeding, petitioner complains only of the fact that the District Court, although granting him injunctive relief, denied the petition for a writ of habeas corpus. Assuming that the District Court was correct on the merits, the relief which it granted was appropriate.

1. At the hearing before the District Court, it became evident that petitioner was not really seeking relief from custody; he was seeking to prevent future executive action allowing him to be tried by the Japanese authorities. The injunctive relief granted was thus the only suitable remedy if his claim was valid.

2. Even if traditional habeas corpus forms had been followed, the result would not have been different. A court has power to fashion relief as "law and justice require".

ARGUMENT

This case has been consolidated with No. 1103, this Term, which raises serious questions as to the correctness of the decision below and whether the District Court properly enjoined respondents here from delivering petitioner to the Japanese Government. The sole issue raised in this case, No. 1108, is as to the District Court's failure to order petitioner's release. If the Government prevails in No. 1103, there will of course be no merit to petitioner's claim in this case. But in any event we believe there is no substance in petitioner's position. The writ of habeas corpus was not an appropriate remedy under the circumstances

of this case, and, if it were, the relief granted by the District Court relieved petitioner of that custody of which he complained.

1. *Habeas corpus was not an appropriate remedy under the circumstances of this case*

Assuming, as we do, that petitioner's being restricted to the base was sufficient restraint for habeas corpus (but see *Wales* v. *Whitney*, 114 U. S. 564), and that the District Court had jurisdiction to issue the writ for a person in Japan,[2] nonetheless, release from Camp Whittington was not the relief which petitioner desired. Petitioner was not seeking his release from the custody of the army; he was not seeking transfer from one authority to another (such as from military to civil jurisdiction), as in the cases he cites. He was not even seeking a revision of the custody in which the army was then holding him since he was not challenging the right to be administratively confined for grounds other than for transfer to the Japanese government. Rather, he was seeking to have

---

[2] In view of the disposition of the case by the District Court, and for the reasons stated in the text, there is no need to consider the question of whether habeas corpus is available to test the detention of an American held by American authorities in Japan. Under 28 U. S. C. 2241, writs of habeas corpus may be granted by district courts only "within their respective jurisdictions". In *Ahrens* v. *Clark*, 335 U. S. 188, the Court found that this limitation referred to the territorial jurisdiction of each court, and held that the District Court for the District of Columbia did not have jurisdiction to issue a writ with respect to prisoners on Ellis Island, New York. But that decision, as well as subsequent decisions of this Court, have left open the question of whether a different result would be reached where United States citizens

himself retained in, not transferred out of, the very detention in which he was being held.[3]

The function of the writ of habeas corpus is to bring about release from custody. This Court said in *McNally* v. *Hill*, 293 U. S. 131, 137, that there is "no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, * * *". As was pointed out in *Orloff* v. *Willoughby*, 345 U. S. 83, 93, it is not the function of the writ to revise duty orders of one lawfully in service.

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were being held in custody by United States officials overseas, outside of the jurisdiction of any district court.

Even if this were still deemed a strict habeas corpus proceeding, the Court need not reach the question of whether the District Court for the District of Columbia has jurisdiction to grant a writ of habeas corpus for a person who at all relevant times has been in Japan. As shown in our brief in No. 1103, the merits of the case are clear. And if the merits are clear, it is permissible to pass over a jurisdictional problem of greater difficulty where the resolution of that issue would not change the result. See *Brooks* v. *Dewar*, 313 U. S. 354, 359–360; *Johnson* v. *Eisentrager*, 339 U. S. 763, 790–791; *Secretary of Agriculture* v. *Central Roig Ref. Co.*, 338 U. S. 604, 619–620.

If the Court should feel it necessary to reach the jurisdictional issue, the Government's present position is that the implications of the ruling of this Court in *Reid* v. *Covert*, No. 701, October Term, 1955, decided June 10, 1957, as well as of other decisions subsequent to *Ahrens*, militate against any construction of 28 U. S. C. 2241, *supra*, which would deprive an American citizen overseas of the constitutionally-protected remedy of habeas corpus, where the requirements of custody are shown.

[3] The validity of a detention questioned by a petition for a writ of habeas corpus is to be determined by the conditions existing at the time of the final decision thereon (*Mensevich* v. *Tod*, 264 U. S. 134, 137) and not merely on the basis of the original allegations.

As noted, the only restraint to which petitioner objects is that he is restricted to Camp Whittington—and he does not in fact object to that restraint but only to its purpose. For if peitioner were to leave the base he could at any time be taken into custody by Japanese authorities—the very custody from which he seeks to require the United States to protect him. Petitioner thus sought not freedom to travel within Japan, but rather the protective custody of the United States. Petitioner was calling for affirmative action by the United States armed forces to protect his alleged right to be a fugitive from Japanese justice. This was granted by the District Court.

Petitioner could not, and does not, complain of restriction to the base for other reasons. Certainly, the courts will not review on habeas corpus the right of a commanding officer to deny a pass to a soldier for whatever reason he sees fit. But, to repeat, the substance of petitioner's complaint was that action was about to be taken to change his custody which would, he alleged, violate his constitutional rights and for which damages would not be an adequate remedy. The court therefore properly treated the petition as one for declaratory and equitable relief.

2. *The relief granted by the District Court relieved petitioner of the custody of which he complained*

In any event, even if the district judge had acted within the precise framework of the habeas corpus proceeding, the actual result would be no different from the one presently ordered. Petitioner himself admits that the statute, 28 U. S. C. 2243, gives a court power to "dispose of the matter as law and justice

require." This Court has many times held that, under such power, a district court may withhold the issuance of the writ pending corrective action by other courts or by administrative authority. See *Tod* v. *Waldman*, 266 U. S. 113, 118, where this Court ruled specifically that the lower court should not have directed the discharge of excluded aliens who had been denied a fair hearing, but should have ordered their discharge only if a proper administrative appeal were not granted within 30 days. See also *Dowd* v. *Cook*, 340 U. S. 206; *Mahler* v. *Eby*, 264 U. S. 32, 46; *In re Bonner*, 151 U. S. 242, 261. Habeas corpus does not require the immediate discharge of a prisoner; the court may frame some other order appropriate to the circumstances. *Chessman* v. *Teets*, No. 893, this Term, decided June 10, 1957. Hence, even on petitioner's theory that relief should have been granted in the habeas corpus proceeding as such, the District Court was not obliged to order petitioner's immediate discharge from the custody in which he was being held; the court was free to issue any appropriate order which would insure petitioner that the custody in which he might be held would be legal, not illegal.

The only illegality alleged by petitioner as to his restraint was that he was being restrained "for the purpose of being delivered over to the government of Japan." Se Paragraphs 2 and 3 of the Petition for Writ of Habeas Corpus, *infra*, p. 16. By enjoining petitioner's delivery, the court removed the sole aspect of the custody of which he complained.

If traditional habeas corpus forms had been followed, the same relief would have been accorded him by directing his release unless he was restricted

to the base for some other reason. But by enjoining the respondents from delivering petitioner to the Japanese Government the court prevented petitioner from being confined for that purpose. If the decision should be affirmed, it is plain that petitioner could no longer be restricted to Camp Whittington except for other reasons—the possible existence or validity of which petitioner does not and cannot challenge.

Petitioner's complaint as to the District Court's remedy is thus wholly one of form, not of substance.

CONCLUSION

It is respectfully submitted that the order denying the petition for a writ of habeas corpus should be sustained.

J. LEE RANKIN,
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BEATRICE ROSENBERG,
Attorney.

JULY 6, 1957.

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In the United States District Court for the District of Columbia

H. C. 47–57

WILLIAM S. GIRARD, UNITED STATES ARMY SPECIALIST 3/C, PETITIONER

v.

CHARLES E. WILSON, SECRETARY OF DEFENSE; JOHN FOSTER DULLES, SECRETARY OF STATE; WILBUR M. BRUCKER, SECRETARY OF THE ARMY; GENERAL MAXWELL D. TAYLOR, HEAD JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE; MAJOR GENERAL W. H. MAGLIN, PROVOST MARSHAL GENERAL, UNITED STATES ARMY; GENERAL LYMAN LEMNITZER, COMMANDING GENERAL, FAR EAST COMMAND; RESPONDENTS

PETITION FOR WRIT OF HABEAS CORPUS

The petition of William S. Girard by his brother, Louis Girard, and his attorneys, Earl J. Carroll of San Francisco, California, Joseph S. Robinson of New York City, N. Y. and Dayton M. Harrington of Washington, D. C. upon information and belief, respectfully shows:

1. That the petitioner, William S. Girard, is a citizen of the United States and a resident and citizen of the State of Illinois. That he is now and has been since November 9, 1953, in the Military Service of the United States presently holding the rank of United States Army Specialist 3/C. Petitioner is currently held, pursuant to Military orders and by direction of the Military Authorities, in the territorial bounds of Japan and within the jurisdiction of the Far East Command of the United States Army. Peti-

tioner's last term of enlistment expired on February 12, 1957 on which date he was to be returned to the United States for separation from Military Service.

2. That heretofore and on or about January 30, 1957 the petitioner was arrested and thereafter held in confinement by the Military Authorities of the United States. The petitioner is presently held in such confinement by the said Military Authorities and at the instance of the United States Secretary of State for the purpose of being delivered over to the government of Japan for trial for an alleged offense over which that government of Japan has no jurisdiction, nor has the government of Japan any jurisdiction over the person of the petitioner.

3. Petitioner alleges that his detention by the Respondents for the purposes hereinabove alleged, is illegal and in violation of the Constitution and Laws of the United States as well as the Treaty Rights and obligations of the Government of the United States.

4. Petitioner alleges further that the reasons assigned by the Secretary of Defense and the Secretary of State in their joint statement of June 4, 1957 for his detention, are invalid in law and in violation of the fundamental, constitutional and legal rights of the petitioner and his continued detention by the respondents herein and their subordinates in command are without authority in law.

5. That the respondent herein, Hon. Charles E. Wilson, Secretary of Defense, is the highest ranking official of the military establishment of the United States and is by law and custom of the Military Service, empowered to issue orders to subordinates in command including the Military Personnel who hold the petitioner in confinement at United States Army Camp Whittington in the vicinity of Tokyo, Japan.

6. The respondent, John Foster Dulles, is the Secretary of State of the United States and as such is the highest ranking official of the State Department of the United States; the respondent, Wilber M. Brucker, is Secretary of the Army and as such is the highest ranking official of the Army of the United States; the respondent, General Maxwell D. Taylor, is the Head of the Joint Chiefs of Staff and as such is the highest ranking Military Official of the United States Military Establishment; the respondent, Major General W. H. Maglin, is Provost Marshal General of the Army of the United States and as such is the highest ranking Army Official having jurisdiction over the Military Police Force and over persons held in confinement by such Military Police and the respondent, General Lyman Lemnitzer, is the Commanding General of the Far East Command of the United States Military Establishment and as such is in command of all the United States Military Forces in the area wherein the petitioner is presently held in confinement. All the respondents herein named are by law and custom of the Military Service empowered to issue orders to subordinates in command and to all persons who now physically hold the petitioner in confinement and said respondents are duty bound to take such action as respects the petitioner as the Honorable Court may order and direct.

7. That the cause or pretense of the restraint of the petitioner is as hereinabove set forth and the imprisonment and restraint of the petitioner for the purposes of delivering him to a foreign government as set forth in the joint statement of the State and Defense Departments on June 4, 1957 is illegal and in violation of the petitioner's fundamental and constitutional rights as a citizen and resident of the United States serving in its Armed Forces.

8. Your petitioner further alleges that any treaty or agreement purported to authorize and or empower any official of the United States to hold, imprison or confine a citizen of the United States for the purpose of transferring him to a foreign jurisdiction under the circumstances set forth in this petition, is illegal and in violation of the Laws and Constitution of the United States.

9. No previous application has been made for the relief herein sought to any court or Judge.

WHEREFORE your petitioner prays that a Writ of Habeas Corpus issue directed to Charles E. Wilson, Secretary of Defense; John Foster Dulles, Secretary of State; Wilber M. Brucker, Secretary of the Army; General Maxwell D. Taylor, Head Joint Chiefs of Staff, Department of Defense; Major General W. H. Maglin, Provost Marshal General, United States Army; General Lyman Lemnitzer, Commanding General, Far East Command; and their subordinates in command, requiring them to forthwith have the body of petitioner, William S. Girard, together with the case of his imprisonment and restraint brought before the United States District Court for the District of Columbia or a Judge thereof, to inquire into the legality of his restraint, and

IT IS FURTHER PRAYED that your petitioner be granted such other further and equitable relief as this court may deem just and proper.

(Sgd.) Earl J. Carroll.
EARL J. CARROLL.

STATE OF NEW YORK,
County of New York, ss:

EARL J. CARROLL, being duly sworn deposes and says:

That he is one of the attorneys for the petitioner herein; that he has read and signed the foregoing petition; that he knows the contents thereof; that all matters therein contained are true except those matters stated on information and belief and that such matters he believes to be true.

(Sgd.) Earl J. Carroll.
EARL J. CARROLL.

Sworn to before me this 5th day of June 1957.

EARL J. CARROLL,
and JOSEPH S. ROBINSON,
745 Fifth Avenue, New York 22, N. Y.
Murray Hill 8-1067,
DAYTON M. HARRINGTON,
454 Washington Building, Washington, D. C.,
Republic 7-7137,
Attorneys for Petitioner:

In the United States District Court for the District of Columbia

H. C. 47-57

WILLIAM S. GIRARD, PETITIONER

v.

CHARLES E. WILSON, ET AL., RESPONDENTS

RETURN AND ANSWER TO THE RULE TO SHOW CAUSE

Come now the respondents by their attorney, the United States Attorney, and as a return and answer to the rule to show cause respectfully represent to the Court the following:

1. The petitioner William S. Girard, R. A. 16452809, is a specialist 3rd class in the Regular Army of the United States assigned to Company F, 8th Cavalry

Regiment, at Camp Whittington, Honshu, Japan, having re-enlisted while in Japan on October 28, 1954, for a period of three years. This term of enlistment is to expire on October 27, 1957.

2. On January 30, 1957, petitioner, while on a firing range known as Camp Weir Range in Japan, shot and killed a Japanese woman by firing an expended cartridge case from a grenade launcher which cartridge penetrated her back and caused her death.[1]

3. The above constitutes an offense within the concurrent jurisdiction of both the United States and Japan, consequently coming within the provisions of the Protocol to amend Article XVII of the Administrative Agreement entered into between the United States and Japan pursuant to Article III of the Security Treaty between the governments of these two countries. The above-mentioned Protocol and agreements have been held to be valid and constitutional. *May* v. *Wilson*, C. A. No. 128–56, D. C. D. C. Also *Cozart* v. *Wilson*, 98 U. S. App. D. C. 437, 236 F. 2d 732 (1956). They are essential to the national defense of the United States and a valid exercise of the sovereign power of the United States in the conduct of foreign affairs.

4. Under applicable treaty arrangements, the exercise of jurisdiction by the United States is never mandatory but is discretionary with the United States. The United States has decided not to exercise jurisdiction in this case, and has entered into a valid and binding agreement with Japanese authorities to that effect.

5. Petitioner is not now nor was he at the time of

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[1] There are attached hereto and made a part hereof Government's exhibits 1 through ——. [Not reproduced.]

the filing of this petition in the custody of the United States within the meaning of 28 United States Code 2241. He is and has been on a normal duty status restricted by military orders to the military base of Camp Whittington. The remedy of habeas corpus does not lie under such circumstances. *Wales* v. *Whitney*, 114 U. S. 564 (1885).

The respondents call this to the Court's attention but do not press the point and are prepared to treat the petition as an application for equitable and/or declaratory relief.

6. The petitioner is not now nor was he at the time of the filing of the petition herein within the territorial limits of the District of Columbia. Therefore the United States District Court for the District of Columbia has no jurisdiction to consider his application for a writ of habeas corpus. *Ahrens* v. *Clark*, 335 U. S. 188 (1948). While this point has been decided against the respondents in *Cozart* v. *Wilson*, *supra*, respondents wish to preserve this point.

7. The decision by the United States not to exercise jurisdiction in this case is a discretionary decision of the Executive Branch in the conduct of foreign affairs and the military defense of the United States, and as such is a political decision not subject to judicial review. There has been no abuse of discretion.

CONCLUSION

For the reasons set forth herein together with the attached memorandum [not reproduced] which is by reference made a part hereof, respondents respect-

fully move this Court to dismiss the petition for writ of habeas corpus and to discharge the rule to show cause.

(Sgd) _____
OLIVER GASCH,
United States Attorney.

(Sgd) _____
E. RILEY CASEY,
Assistant United States Attorney.

(Sgd) _____
HAROLD H. GREENE,
Assistant United States Attorney
Counsel for defendant.

In the United States District Court for the District of Columbia

Habeas Corpus 47–57

WILLIAM S. GIRARD, PETITIONER

v.

CHARLES E. WILSON, ET AL., RESPONDENTS

REPLY TO RETURN AND ANSWER TO THE RULE TO SHOW CAUSE

Come now the petitioner by his attorneys and as a reply to the return and answer to the rule to show cause, upon information and belief, respectfully represent to the Court the following:

1. The petitioner William S. Girard, R. A. 6452809, is a specialist 3rd Class in the Regular Army of the United States assigned to Company F, 8th Cavalry Regiment, at Camp Whittington, Honshu, Japan, having re-enlisted while in Japan on October 28, 1954.

On February 12, 1957, he was to be returned to the United States.

2. Camp Weir Range is a maneuver area reserved to the United States for its exclusive use by the United States Armed Forces. The United States has consented to occasional use thereof by Japanese authorities provided that such use would not be harmful to the purposes for which said facilities and area were used by the United States Armed Forces, and provided further that it continued to be an area within the exclusive jurisdiction of the United States.

3. On January 30, 1957, while such maneuver area was being used exclusively by the Armed Forces of the United States, the petitioner was stationed there and by the lawful command of his superior officer assigned to guard duty thereon to guard property of the United States. While in such area and in performance of such guard duty he discharged his grenade launcher in performance of his official assigned duty. At about said time a number of Japanese nationals were trespassing on said area for the purpose of stealing property of the United States Government which petitioner was assigned to guard. A Japanese national was allegedly injured by act of the petitioner resulting in death.

4. The facts above stated constitute no offense against the laws of Japan and no offense against the laws of the United States. Nevertheless, the petitioner has been indicted by a Japanese Court and is presently being held in the custody and under the control of United States military authorities in Japan to be handed over for trial before a Japanese Court, to which Court the Military and State Department officials have agreed to hand over petitioner.

5. No valid treaty exists between the United States and Japan providing for the delivery of the petitioner

to Japanese authorities for trial of the offense alleged or for any other purpose.

6. Petitioner is now, and was at all times since the filing of this petition, in the custody of the respondents and their subordinates in command on the military base of Camp Whittington, Japan, to which base he is restricted, and from which base he may not depart.

7. The detention of petitioner is unlawful and the decision to deliver petitioner to a foreign government is without authority in law.

8. Other than herein above pleaded, petitioner denies each and every allegation of the return and answer to the rule to show cause.

Wherefore the petitioner prays that the writ of habeas corpus requested in the petition in support of the rule to show cause be granted.

(Sgd)_____

EARL J. CARROLL.

No. 1109

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM S. GIRARD,

PETITIONER

HABEAS CORPUS
NO. 47-57

CHARLES E. WILSON, ET AL.,

RESPONDENTS

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

SIMULTANEOUS WITH THE SIGNING OF THE TREATY OF PEACE OF SEPTEMBER 8, 1951, A SECURITY TREATY WAS ENTERED INTO BETWEEN THE UNITED STATES AND JAPAN. IT CONSISTS OF FIVE PARAGRAPHS. IT RECITES THAT AT THE REQUEST OF JAPAN AND FOR ITS DEFENSE, THE UNITED STATES AGREES TO MAINTAIN CERTAIN OF ITS ARMED FORCES IN JAPAN. ARTICLE 3 READS: "THE CONDITION WHICH SHALL GOVERN THE DISPOSITION OF ARMED FORCES OF THE UNITED STATES OF AMERICA IN AND ABOUT JAPAN SHALL BE DETERMINED BY ADMINISTRATIVE AGREEMENTS BETWEEN THE TWO GOVERNMENTS." (UNDERLINING SUPPLIED.)

THE WORD "DISPOSITION" AS GENERALLY UNDERSTOOD AND AS DEFINED IN ALL DICTIONARIES MEANS ARRANGEMENT, ALLOCATION, PLACEMENT, EMPLOYMENT, USE, ETC. NOWHERE IS IT DEFINED TO INCLUDE STATUS OR OTHER MEANINGS WHICH THE RESPONDENTS ATTRIBUTE TO IT.

RELYING ON THE WORDING OF ARTICLE 3 OF THE SECURITY PACT, "AN ADMINISTRATIVE AGREEMENT" WAS ENTERED INTO ON FEBRUARY 28, 1952 WHEREIN IT WAS PROVIDED, AMONG OTHER THINGS, THAT THE UNITED STATES SHALL HAVE EXCLUSIVE CRIMINAL JURISDICTION OVER ALL OFFENSES WHICH MAY BE COMMITTED IN JAPAN BY MEMBERS OF THE ARMED FORCES, THE CIVILIAN COMPONENTS THEREOF AND OVER CERTAIN DEPENDENTS (ARTICLE XVII). IT WAS FURTHER PROVIDED THAT AT A LATER DATE THE UNITED STATES WOULD CONCLUDE WITH JAPAN, AT THE OPTION OF JAPAN, ANOTHER AGREEMENT ON CRIMINAL JURISDICTION SIMILAR TO THE NATO STATUS OF FORCES TREATY.

ON OR ABOUT SEPTEMBER 29, 1953, MR. ALLISON, ACTING ON BEHALF OF THE UNITED STATES, ENTERED INTO A SO-CALLED PROTOCOL TO AMEND THE ADMINISTRATIVE AGREEMENT OF FEBRUARY 28, 1952 AND THEREBY SOUGHT TO CHANGE ENTIRELY (NOT AMEND) THE CRIMINAL JURISDICTION WHICH THE UNITED STATES HAD THERETOFORE EXERCISED OVER ITS ARMED FORCES IN JAPAN.

A PROTOCOL IS DEFINED IN THE DICTIONARY AS AN ORIGINAL DRAFT OR A WORD USED IN DIPLOMATIC PARLANCE AS A "PRELIMINARY MEMORANDUM, AS OF RESOLUTIONS ARRIVED AT IN NEGOTIATIONS, OFTEN SIGNED BY THE NEGOTIATORS, AS A BASIS FOR A FINAL CONVENTION OR TREATY".

THERE IS NOTHING IN THE SECURITY TREATY OF SEPTEMBER 8, 1951 OR THE ADMINISTRATIVE AGREEMENT OF FEBRUARY 28, 1952 ALLEGEDLY MADE PURSUANT TO ARTICLE 3 OF THE SECURITY TREATY, WHICH PERMITS OR AUTHORIZES MR. ALLISON OR ANY OTHER PERSON ACTING ON BEHALF OF THE UNITED STATES TO WHITTLE AWAY OR SURRENDER JURISDICTION WHICH THE UNITED STATES HAD BEEN EXERCISING OVER ITS OWN MILITARY FORCES IN JAPAN. THERE IS A STATEMENT IN ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT THAT THE UNITED STATES WILL CONCLUDE WITH JAPAN AN AGREEMENT ON CRIMINAL JURISDICTION SIMILAR TO THE NATO STATUS OF FORCES TREATY, BUT THE FACT REMAINS THAT NO SUCH AGREEMENT WAS EVER ENTERED INTO. THE PROTOCOL WAS MERELY THE PRELIMINARY NEGOTIATIONS. FURTHERMORE THE CONGRESS OF THE UNITED STATES MADE SPECIFIC RESERVATIONS IN THE NATO STATUS OF FORCES TREATY, ONE OF WHICH WAS THAT SAID AGREEMENT WOULD NOT BE APPLICABLE IN ANY CASE WHERE THE CONSTITUTIONAL RIGHTS OF THE ACCUSED MEMBER OF OUR ARMED FORCES MAY BE DIMINISHED, DENIED OR DESTROYED. THERE WAS THE ADDITIONAL RESERVATION OR PROVISO WHICH THE SENATE IMPOSED, NAMELY THAT THE NATO AGREEMENTS WERE NOT TO BE A PRECEDENT FOR FURTHER AGREEMENTS. THIS WAS A DIRECT MANDATE BY THE SENATE, WHICH BODY IS CHARGED UNDER THE CONSTITUTION WITH THE DUTY OF MAKING LAWS FOR THE PEOPLE OF THE UNITED STATES, THAT THE SO-CALLED NATO STATUS OF FORCES AGREEMENT WOULD NOT BE EXTENDED TO OTHER COUNTRIES. ONLY IN THE CASE OF THE NATO NATIONS WAS THE SENATE WILLING TO RELINQUISH JURISDICTION.

THE SENATE'S ACTION CONFERRING JURISDICTION OVER OFF DUTY OFFENSES TO THE VISITED NATO COUNTRY INDICATES ITS UNDERSTANDING OF INTERNATIONAL LAW THAT OUR ARMY WAS NOT SUBJECTED TO THE JURISDICTION OF THE FOREIGN NATION. HAD JURISDICTION EXISTED IN THE FOREIGN COUNTRY AS THE RESPONDENTS HERE CONTEND, THERE WOULD HAVE BEEN NO NEED TO CONFER JURISDICTION.

THE POSITION WHICH THE GOVERNMENT HAS TAKEN THAT UNDER INTERNATIONAL LAW A VISITING FORCE IS SUBJECT TO THE JURISDICTION OF THE NATION IN WHICH IT IS STATIONED, IS WRONG. THAT IS NOT THE LAW, THE SENATE DID NOT THINK IT WAS THE LAW AND THE SCHOONER CASE ON WHICH RESPONDENTS RELY DOES NOT SUPPORT THE POSITION. (SEE DISCUSSION ON THIS SUBJECT HEREINAFTER SET FORTH.)

THE PROTOCOL OF SEPTEMBER 29, 1953 WAS IN DISREGARD OF THE RESERVATIONS WHICH THE SENATE OF THE UNITED STATES DIRECTED BE FOLLOWED WHEN IT APPROVED, BY A CLOSE VOTE, THE NATO STATUS OF FORCES TREATY. THE PROTOCOL, ASIDE FROM ITS ILLEGALITY AND UNCONSTITUTIONALITY (A SUBJECT HEREINAFTER REFERRED TO), HAS NO LEGAL VALIDITY ON OTHER GROUNDS: FIRST, BECAUSE IT IS NOT AN AGREEMENT, BUT MERELY A STATEMENT OR PRELIMINARY MEMORANDUM OF NEGOTIATIONS WHICH WERE TO BE THE BASIS OF A FINAL AGREEMENT. SECOND, BECAUSE THE NEGOTIATOR WHO SIGNED ON BEHALF OF THE UNITED STATES EXCEEDED THE PROVISIONS OF ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT, WHICH THE RESPONDENTS ASSERT IS THE SOURCE OF THE AUTHORITY FOR THE PROTOCOL AND THIRD BECAUSE IT WAS NOT AUTHORIZED OR RATIFIED BY THE UNITED STATES SENATE.

FOR THE PURPOSE OF THE ARGUMENT WHICH FOLLOWS AND FOR NO OTHER, THE PETITIONER WILL ASSUME THAT THE PROTOCOL OF SEPTEMBER 29, 1953 MAY BE VIEWED AS A VALID AGREEMENT. IT GRANTED TO JAPAN CERTAIN CRIMINAL JURISDICTION WITH THE EXPRESS RESERVATION THAT THE MILITARY AUTHORITIES OF THE UNITED STATES SHALL HAVE THE PRIMARY RIGHT TO EXERCISE JURISDICTION OVER MEMBERS OF THE UNITED STATES ARMED FORCES AND THE CIVILIAN COMPONENTS THEREOF WITH RESPECT TO (I) OFFENSES SOLELY AGAINST THE PROPERTY OR SECURITY OF THE UNITED STATES OR OFFENSES SOLELY AGAINST THE SECURITY OR PROPERTY OF ANY MEMBER OF THE UNITED STATES ARMED FORCES OR CIVILIAN COMPONENTS OR OF A DEPENDENT (II) OFFENSES ARISING OUT OF ANY ACT OR OMISSION DONE IN THE PERFORMANCE OF OFFICIAL DUTY." IT WAS FURTHER PROVIDED THAT "IF THE STATE WHO HAD THE PRIMARY RIGHT DECIDES NOT TO EXERCISE JURISDICTION IT SHALL NOTIFY THE AUTHORITIES OF THE OTHER STATE AS SOON AS PRACTICAL. THE AUTHORITIES OF THE STATE HAVING THE PRIMARY RIGHT SHALL GIVE SYMPATHETIC CONSIDERATION TO A REQUEST FROM THE AUTHORITIES OF THE OTHER STATE FOR A WAIVER OF ITS RIGHT IN CASES WHERE THAT OTHER STATE CONSIDERS SUCH WAIVER TO BE OF PARTICULAR IMPORTANCE".

AS PART OF THE PROTOCOL ARE CERTAIN "AGREED OFFICIAL MINUTES REGARDING PROTOCOL" OF SEPTEMBER 29, 1953. IT APPEARS THAT THE NEGOTIATORS SOUGHT TO INCORPORATE SAME BY REFERENCE. THE "AGREED OFFICIAL MINUTES" PROVIDE "WHEN A MEMBER OF THE UNITED STATES ARMED FORCES OR THE CIVILIAN COMPONENT IS CHARGED WITH AN OFFENSE, A CERTIFICATE ISSUE BY OR ON BEHALF OF HIS COMMANDING OFFICER STATING THAT THE ALLEGED OFFENSE, IF COMMITTED BY HIM, AROSE OUT OF AN ACT OR OMISSION DONE IN THE PERFORMANCE OF OFFICIAL DUTY, SHALL, IN ANY JUDICIAL PROCEEDING, BE SUFFICIENT EVIDENCE OF THE FACT UNLESS THE CONTRARY IS PROVIDED".

EVEN WHEN ALL THE ABOVE DOCUMENTS WERE SIGNED, SEALED AND DELIVERED, THERE WAS STILL LACKING AN AGREEMENT OR PROVISION REQUIRING ONE NATION TO DELIVER ITS NATIONALS TO THE OTHER NATION FOR TRIAL, NOR WAS ANY MACHINERY OR PROCEDURE ESTABLISHED FOR TRANSFER OF SUCH NATIONALS SUCH AS IS NORMALLY CONTAINED IN EXTRADITION TREATIES. A NEW AND NOVEL SOURCE OF LAW WAS THEN EVOLVED. IT IS CALLED 'AGREED VIEWS' PUBLISHED IN A.F.F.E. PAMPHLET 27-1. IT IS THE ALLEGED FUNCTION OF THE AGREED VIEWS TO INTERPRET THE SEVERAL LOOSELY DRAWN DOCUMENTS TO WHICH REFERENCE IS HEREINABOVE MADE. THIS WAS ONLY THEORY FOR, IN FACT THE RESPONDENTS NOW LOOK TO THE 'AGREED VIEWS' AS SOME SORT OF LEGISLATION OR NEW KIND OF AGREEMENT TO CARRY OUT THE SERIES OF BOOT-LIFTING OPERATIONS DESIGNED TO SURRENDER JURISDICTION. ALL THESE ACTS THEY ASSERT, WERE AUTHORIZED BY THE WORDS DISPOSITION OF ARMED FORCES CONTAINED IN ARTICLE I,I OF THE SECURITY TREATY MADE ON SEPTEMBER 8, 1951.

NO-ONE WOULD DENY BUT THAT THIS IS A STRANGE AND NOVEL WAY OF MAKING LAW BINDING ON AMERICAN CITIZENS AND TOUCHING UPON VITAL AND CONSTITUTIONAL RIGHTS OF THOSE WHO SERVE IN THIS NATION'S ARMED FORCES. WERE THIS PRACTICE TO BE SANCTIONED BY THE COURTS AS PROPER AND DONE WITHIN THE FRAMEWORK OF THE UNITED STATES CONSTITUTION, THEN THE ROAD UPON WHICH WE HAVE EMBARKED MAY WELL RESULT IN THE ABOLITION OF THE CONSTITUTION ITSELF.

AT THE HEARING BEFORE THE SUB-COMMITTEE OF THE COMMITTEE ON ARMED SERVICES, UNITED STATES SENATE, IN THE CASE OF WILLIAM S. GIRARD, HELD ON JUNE 5, 1957, THE COMMITTEE MEMBERS (TWO UNITED STATES SENATORS) EXPRESSED GRAVE DOUBT AS TO THE VALIDITY AND CONSTITUTIONALITY OF THE WHOLE SERIES OF ACTS TO WHICH REFERENCE IS HEREINABOVE MADE. (SEE EXHIBIT I ATTACHED).

AT THE SAME HEARING IT WAS DISCLOSED THAT THE UNITED STATES MADE A PURELY POLITICAL DECISION TO TURN GIRARD OVER TO THE JAPANESE AUTHORITIES FOR TRIAL AND THAT IT WAS DONE BECAUSE OF PUBLIC CLAMOR IN JAPAN. THE HEARING FURTHER REVEALED THAT THE UNITED STATES MAINTAINED THROUGHOUT THE NEGOTIATIONS WITH THE JAPANESE THAT IT WAS RIGHT ON THE LAW AND THE FACTS AND THAT GIRARD'S ACT WAS DONE IN THE COURSE OF ASSIGNED MILITARY DUTY. THE UNITED STATES FINALLY MADE THE POLITICAL DECISION TO GIVE IN TO THE JAPANESE BUT IT WAS NOT DONE AS THE ~~PROPOSAL~~ Protocol PROVIDED. IT WAS DEMONSTRATED AT THIS SENATE HEARING THAT THE FINAL DECISION AS TO WHO SHALL EXERCISE JURISDICTION IS VESTED SOLELY IN JAPAN IF THE PROCEDURE FOLLOWED IN THE GIRARD CASE IS TO BE CONSIDERED A PRECEDENT. ANOTHER ASTOUNDING FACT WAS BROUGHT TO LIGHT, NAMELY THE DEFENSE DEPARTMENT MADE THE POLITICAL DECISION AND NOT THE STATE DEPARTMENT, WHICH

DEPARTMENT IS THE BRANCH OF GOVERNMENT ALONE CHARGED BY LAW WITH THE DUTY OF CONDUCTING THIS NATION'S AFFAIRS WITH FOREIGN COUNTRIES. THE WHOLE SERIES OF ILLEGAL ACTS AND THE MUMBO-JUMBO ACTS BY WHICH THE EXECUTIVE BRANCH OF THE GOVERNMENT NOW SEEKS TO CREATE A TREATY OBLIGATION IS ALSO REVEALED IN THE RECORD OF THE SENATE COMMITTEE HEARING ON THIS CASE.

THE GOVERNMENT HAS EXPRESSED ITS POSITION WITH RESPECT TO THESE MATTERS IN UNEQUIVOCAL TERMS IN PARAGRAPH 7 OF THEIR ANSWER OR RETURN. IT IS THERE SAID, "7 - THE DECISION BY THE UNITED STATES NOT TO EXERCISE JURISDICTION IN THIS CASE IS A DISCRETIONARY DECISION OF THE EXECUTIVE BRANCH IN THE CONDUCT OF FOREIGN AFFAIRS AND THE MILITARY DEFENSE OF THE UNITED STATES, AND AS SUCH IS A POLITICAL DECISION NOT SUBJECT TO JUDICIAL REVIEW."

IF JURISDICTION IN CRIMINAL CASES MAY BE VESTED BY THE EXERCISE OF AN ASSERTED, NEBULOUS DISCRETIONARY POWER OF THE EXECUTIVE BRANCH (IN THIS CASE THE MILITARY AUTHORITIES AND NOT THE STATE DEPARTMENT OFFICIALS EXERCISED THE CLAIMED POWER), THEN WE ARE FAR REMOVED FROM THE BASIC CONCEPTS OF THE AMERICAN FORM OF GOVERNMENT. WHAT CLAUSE IN THE CONSTITUTION MAY BE SAID AUTHORIZES DISCRETIONARY POLITICAL POWER TO DETERMINE CRIMINAL JURISDICTION OVER AN AMERICAN CITIZEN AND WHAT ARE THE BOUNDS OF SUCH DISCRETION. THERE IT IS SAID TO HAVE BEEN EXERCISED TO SATISFY THE PUBLIC CLAMOR OF THE JAPANESE PEOPLE. (EXHIBIT 1) BUT SINCE WHEN HAS THE BACKBONE OF THE EXECUTIVE BRANCH BEEN SO WEAKENED THAT WE SUBROGATE THE RULE OF LAW TO THE CONVENIENCES OF THAT BRANCH OF THIS GOVERNMENT AND FROM WHENCE DOES THAT RIGHT STEM. THIS IS THE ISSUE IN THIS CASE AND NOT THE "CRY-BABY" CLAIM THAT THE JAPANESE GOVERNMENT WOULD BE MORE LENIENT WITH OUR MILITARY MEN WHO COMMIT OFFENSES THAN WOULD THE UNITED STATES GOVERNMENT. IT IS NOT LENIENCY WHICH GIRARD SEEKS BUT JUSTICE UNDER LAW AND WITHIN THE RULES OF LAW AS WE KNOW THEM AND NOT AS THE JAPANESE HAVE INTERPRETED THEM FOR US. MR. DECKERT'S TESTIMONY ON THIS SUBJECT BEFORE THE SENATE COMMITTEE IS ENLIGHTENING BUT MOST DISHEARTENING.

ALL OF THE WORDS OF THE SUPREME COURT OF THE UNITED STATES IN THE RECENT REID DECISION. THE QUOTATION FROM LORD COKE, MADE CENTURIES AGO, COMES AS A REFRESHING RAY OF LIGHT IN THE PRESENT DAY, WHEN A GOVERNMENT OF THE PEOPLE OPENLY STATES THAT IT SACRIFICED ONE OF ITS CITIZENS FOR CONVENIENCE AND THAT IT HAS THE UNFETTERED DISCRETIONARY POWER TO DO SO. THE GREAT EMINENT JURIST LORD COKE SAID, GOD SEND ME NEVER TO LIVE UNDER THE LAW OF CONVENIENCY OR DISCRETION.

THE SUPREME COURT OF THE UNITED STATES IN THE RECENT REID DECISION CONDEMNED AGREEMENTS OF THE NATURE INVOLVED IN THIS CASE AND STATED,

"THE UNITED STATES IS ENTIRELY A CREATURE OF THE CONSTITUTION. ITS POWER AND AUTHORITY HAVE NO OTHER SOURCE. IT CAN ONLY ACT IN ACCORDANCE WITH ALL THE LIMITATIONS IMPOSED BY THE CONSTITUTION. WHEN THE GOVERNMENT REACHES OUT TO PUNISH A CITIZEN WHO IS ABROAD, THE SHIELD WHICH THE BILL OF RIGHTS AND OTHER PARTS OF THE CONSTITUTION PROVIDE TO PROTECT HIS LIFE AND LIBERTY SHOULD NOT BE STRIPPED AWAY JUST BECAUSE HE HAPPENS TO BE IN ANOTHER LAND".

ASIDE FROM THE UNCONSTITUTIONALITY AND ILLEGALITY OF THE SEVERAL DOCUMENTS UPON WHICH RESPONDENTS RELY FOR THEIR SOURCE OF AUTHORITY TO TRANSFER THE BODY OF GIRARD TO THE JAPANESE GOVERNMENT FOR TRIAL, AN EXAMINATION OF THE TEXT OF SAID DOCUMENTS REVEALS THAT NO SUCH AUTHORITY WAS GRANTED AND THE RESPONDENTS ARE ACCORDINGLY WITHOUT POWER TO ACT.

ASSUMING THE DOCUMENTS TO BE LEGAL IT APPEARS THAT THE ADMINISTRATIVE AGREEMENT OF FEBRUARY 28, 1952 AND THE PRELIMINARY NEGOTIATIONS REFERRED TO AS THE PROTOCOL OF SEPTEMBER 29, 1953 AND THE OFFICIAL MINUTES INCORPORATED THEREIN CONFERS PRIMARY JURISDICTION IN THE UNITED STATES. JAPAN AGREED THAT THE UNITED STATES SHALL HAVE THE RIGHT TO EXERCISE JURISDICTION OVER THE MEMBERS OF ITS ARMED FORCES AND THAT IF THE OFFENSE AROSE OUT OF ANY ACT OR OMISSION DONE IN PERFORMANCE OF OFFICIAL DUTY THAT THE UNITED STATES WOULD HAVE PRIMARY JURISDICTION. JAPAN ALSO AGREED THAT WHEN A MEMBER OF THE UNITED STATES ARMED FORCES IS CHARGED WITH AN OFFENSE, A CERTIFICATE BY HIS COMMANDING OFFICER STATING THAT THE ACT AROSE OUT OF THE PERFORMANCE OF OFFICIAL DUTY SHALL IN ANY JUDICIAL PROCEEDING BE SUFFICIENT EVIDENCE OF THE FACT UNLESS THE CONTRARY IS PROVED. JAPAN FURTHER AGREED THAT EACH STATE WOULD GIVE "SYMPATHETIC CONSIDERATION" TO A REQUEST FOR A WAIVER OF PRIMARY JURISDICTION BUT THERE NEVER WAS ANY AGREEMENT THAT IT HAD TO BE GIVEN AND THERE IS NO LAW OR RULE ANYWHERE WHICH VESTS POWER IN THE UNITED STATES AUTHORITIES TO GRANT A WAIVER OR TO ACCEDE TO JAPAN'S REQUEST. JAPAN PRESSED ON AND THE MATTER NEVER REACHED THE HIGH OFFICIALS OF GOVERNMENT AS MADE AND PROVIDED IN THE AGREEMENTS. JUNIOR OFFICIALS FINALLY SURRENDERED. (SEE EXHIBIT 1) HOWEVER UNLESS THERE IS A STATUTE OR A VALID TREATY AGREEMENT, WHICH UNDER OUR CONSTITUTIONAL SYSTEM CONSTITUTES A LAW WHICH VESTS POWER IN THE EXECUTIVE TO DELIVER AMERICAN CITIZENS TO A FOREIGN GOVERNMENT, HE MAY NOT DO SO NOR DOES HE HAVE ANY DISCRETION IN THE MATTER. (VALENTINE V. UNITED STATES 299 U.S.5).

CONTRARY TO THE CONTENTION OF RESPONDENTS' COUNSEL MADE AT THE HEARING ON JUNE 11, 1957 THAT WE WOULD BE BREACHING OUR AGREEMENT WITH JAPAN IF WE DID NOT DELIVER GIRARD TO IT FOR TRIAL, IT IS THE JAPANESE GOVERNMENT WHO IS BREACHING THE PACT BY ITS ASSERTION OF RIGHTS WHICH UNDER THE ADMINISTRATIVE AGREEMENT AND THE PROTOCOL IT DID NOT HAVE.

IN THIS CASE A CERTIFICATE OF OFFICIAL DUTY WAS ISSUED BY GIRARD'S COMMANDING OFFICER STATING THAT GIRARD WAS ACTING IN THE PERFORMANCE OF OFFICIAL DUTY AND THAT THE OFFENSE COMPLAINED OF AROSE OUT OF THE PERFORMANCE OF THAT DUTY (PETITIONER'S EXHIBIT IN EVIDENCE #1). THESE FACTS WERE LIKEWISE STIPULATED BY COUNSEL FOR THE RESPONDENTS ON THE RECORD IN THE HEARING ON THE PETITION FOR THE WRIT HELD ON JUNE 11TH. IT IS UNDISPUTED THAT GIRARD WAS ON GUARD DUTY AND ASSIGNED TO PROTECT UNITED STATES PROPERTY IN A MILITARY AREA AND THAT THERE WERE POSTS WARNING TRESPASSERS AWAY FROM THE PREMISES. THE WARNING SIGNS READ SUBSTANTIALLY AS FOLLOWS: "STOP. YOU ARE VIOLATING THE JOINT ADMINISTRATIVE AGREEMENT BETWEEN THE UNITED STATES AND JAPAN BY ENTERING THIS AREA. OFFENDERS WILL BE APPREHENDED AND TAKEN TO THE JAPANESE POLICE FOR PROSECUTION IN ACCORDANCE WITH THIS AGREEMENT." (EXHIBIT 11)

THAT THE DECEASED TRESPASSED ON TO THE UNITED STATES MILITARY RESERVATION FOR THE PURPOSE OF TAKING PROPERTY WHICH BELONGED TO THE UNITED STATES IS ADMITTED, THAT FOR THE PURPOSE OF SCARING HER AND OTHERS OFF, GIRARD FIRED AN EXPENDED CARTRIDGE CASE AS A WARNING IS ALSO ADMITTED. THESE FACTS AND ALL OTHERS, MOST FAVORABLE TO THE PETITIONER, MUST BE CONSIDERED AS FACTS BY THE COURT SINCE THE PETITIONER WAS NOT PRODUCED AS PROVIDED FOR BY THE UNITED STATES JUDICIARY CODE.

UNDER THE PROTOCOL AS WELL AS UNDER INTERNATIONAL LAW AND THE LAWS OF THE UNITED STATES, THE ALLEGED OFFENSE IS ONE OVER WHICH THE UNITED STATES HAS JURISDICTION. THE EXECUTIVE BRANCH OF THE GOVERNMENT WAS THEREFORE WITHOUT POWER TO WAIVE AWAY ANY OF GIRARD'S RIGHTS - MUCH AS IT WOULD LIKE TO DO FOR POLITICAL CONVENIENCE. FURTHERMORE JAPAN IS BEING ARBITRARY IN ASSERTING RIGHTS WHICH UNDER THE AGREEMENTS IT DID NOT HAVE AND THIS COURT IS NOT DUTY BOUND TO SURRENDER AS DID THE EXECUTIVE BRANCH OF OUR GOVERNMENT FOR POLITICAL CONSIDERATIONS.

IN HIS IMMORTAL FAREWELL ADDRESS, PRESIDENT WASHINGTON WITH SOUND JUDGMENT AND PROFOUND INSIGHT, DISCUSSED THE SEPARATION OF THE POWERS OF GOVERNMENT IN THE FOLLOWING STATEMENT:

> "IT IS IMPORTANT, LIKEWISE, THAT THE HABITS OF THINKING IN A FREE COUNTRY SHOULD INSPIRE CAUTION IN THOSE ENTRUSTED WITH ITS ADMINISTRATION, TO CONFINE THEMSELVES WITHIN THEIR RESPECTIVE CONSTITUTIONAL SPHERES; AVOIDING IN THE EXERCISE OF THE POWERS OF ONE DEPARTMENT TO ENCROACH UPON ANOTHER. THE SPIRIT OF ENCROACHMENT TENDS TO CONSOLIDATE THE POWERS OF ALL THE DEPARTMENTS IN ONE, AND THUS TO CREATE, WHATEVER THE FORM OF GOVERNMENT, A REAL DESPOTISM. . . . . BUT LET THERE BE NO CHANGE BY USURPATION; FOR THOUGH THIS, IN ONE INSTANCE MAY BE THE INSTRUMENT OF GOOD, IT IS THE CUSTOMARY WEAPON BY WHICH FREE GOVERNMENTS ARE DESTROYED. THE PRECEDENT MUST ALWAYS GREATLY OVERBALANCE IN PERMANENT EVIL ANY PARTIAL OR TRANSIENT BENEFIT WHICH THE USE CAN AT ANY TIME YIELD."

POINT I - THE ADMINISTRATIVE AGREEMENT AND SO-CALLED PROTOCOL IS UNCONSTITUTIONAL AND VOID AND ANY ACTION TAKEN BY THE EXECUTIVE BRANCH OF THE GOVERNMENT UNDER AUTHORITY OF SAID DOCUMENTS IS ILLEGAL.

This subject matter has been discussed generally hereinabove. The Constitution of the United States provides, among other things, that the power is in Congress "to make rules for the government and regulation of the land and Naval forces" that the power of the President is to execute the laws and "by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur"; that there must be equal protection of the laws and that all persons charged with an offense must be afforded due process (amendments 5, 6, and 14). It provides further that the judicial power of the United States, which includes the interpretation of treaties or executive agreements, is vested in the courts. No branch of the United States Government has the right to sacrafice a citizen for convenience or political motive and all branches may act only in their own defined sphere.

The Executive branch of the government was never vested with power to make or interpret Treaties or Executive Agreements, such as has been done in this case, nor does it have the power to supply meaning to contracts or Treaties. Leavenworth L. G.I. Co. v. U. S. 92 U. S. 733; 52 American Jurisprudence, p. 805. Treaties like any other contract or statute must be construed by the courts. It is the courts determination which is binding and any political decision as to or meaning or interpretation of a treaty or contract is null and void. Sullivan v. Kidd 255 U.S. 433; Valentine v. United States 299 U.S. 5;

An "Administrative Agreement" or a "Protocol", with or without "minutes" attached, or an expression of "Agreed Views" has no binding force particularly when it deprives a citizen of his constitutional rights. Cherokee Tobacco Case 11 Wall 616, 620; Geofroy v. Riggs 133 U.S. 258, 267.

The Administrative Agreement, Protocol, Minutes to Protocol, Agreed Views, and the other documents on which the respondents rely and which affect the lives and rights of a large segment of the American population, was not entered into in conformity with the provisions of the United States Constitution.

The making of the Agreements involved here is usurpation of power by the executive and is an invasion on the perogatives of the Congress and the Senate of the United States as outlined and defined by the Constitution. If permitted to go unchallenged, it will deny to the petitioner the equal protection of the laws and also deny him due process of law. It is obvious that many constitutional questions are here involved which may not be passed over lightly and which, on the other hand, cannot humanly be properly or adequately briefed in the time allotted to counsel. It may be well for the Government Attorney to pooh-pooh these problems and press for a hurried decision, but that would solve nothing. The two United States Senators who sat as a sub-committee of the Armed Services Committee of the United States Senate in the case of William S. Girard on June 5, 1957, (Senator Ervin and Senator Flanders) did not think that the subject was one that could be made light of. This court may take judicial notice of the report of that hearing. It is extracted in part in Exhibit I hereto attached. The questions involved in this case penetrate deeply into basic concepts of constitutional law and require careful consideration and study. Counsel can touch but briefly on the basic concepts because of the time limitation.

The Cozart case is referred to as a precedent. The Cozart case is not an adjudication as the Supreme Court of the United States has ruled. Furthermore, both that case and the Kay case involved off duty offenses and are in many other respects different from this one.

The Supreme Court of the United States in Cozart v. Wilson 77 S.Ct. Reports 126, after granting certiorari said: "Judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the petition for writ of Habeas Corpus on the ground that the case is moot" -- Citing United States v. Munsingwear 340 U.S. 36.

The Munsingwear case states: "that such procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented there through happenstance. When that procedure is followed; the rights of all the parties are preserved. No one is prejudiced by a decision which in the statutory scheme was only preliminary."

It is a reasonable inference to draw from the fact that certiorari was granted and the judgment of the Court of Appeals vacated, that the Supreme Court of the United States was not willing to let stand unchallenged

that which was enunciated as law in the courts below. There have been other cases which were mooted while on their way to our high court for determination. In many of them the Writ of Certiorari was denied because the question was moot. In any event, with the ruling of the Supreme Court as it now stands, the decision of the lower court cannot be regarded as stare-decisis. It should be noted further that the Court of Appeals in the Cozart case, based its opinion in part on Kinsella v. Kruger, which case was reversed by the Supreme Court of the United States on June 10, 1957. Reid v. Covert, Supra.

It is the contention of the petitioner that the constitutionality of the agreements which surrender jurisdiction to the Japanese government is very much in issue and that the application of those Agreements to this case is also an issue. These questions appear to have been determined adversely to the respondents in the Reid v. Covert case decided June 10, 1957. In that case an Administrative Agreement similar to the one in question was held un constitutional. The Reid case also overruled In Re. Ross 140 U.S. 453, on which the government placed reliance in the Cozart case.

The language of Mr. Justice Black is here particularly appropriate. He said, "...It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights - let alone alien to our entire constitutional history and tradition - to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a Treaty .....".

POINT II. AN ARMY IN THE TERRITORY OF A FOREIGN NATION IS NOT SUBJECT TO THE CRIMINAL LAWS OF THAT NATION WHETHER THEY ENTERED BY FORCE OR BY INVITATION.

Under international law, reaffirmed time and time again by the courts of the country, troops in a foreign territory are immune from the criminal jurisdiction of the territorial sovereign. Coleman v. Tennessee, 97 U.S. 509; Dow v. Johnson, 100 U.S. 158; Tucker v. Alexandroff, 183 U.S. 424; The Schooner Exchange, 7 Cranch 116; Hyde International Law as interpreted by U. S. Court, Vol. 1, Sec. 247; Archibald King, Jurisdiction Over Friendly Armed Forces 36 Amer. Journal of Int. Law 539.

In the Coleman case which has been cited with approval time and time again, at page 515, The Supreme Court of the United States said: "It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. The sovereign is understood, said this court in the celebrated case of The Exchange (7 Cranch 139), to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions: 'In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force..... Aside from this want of jurisdiction, there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded."

A separate memorandum on the subject discussed under this Point and the several other Points of this brief is attached marked Exhibit III.

POINT III. ANY PERSON IN THE MILITARY SERVICE OF THE UNITED STATES IS NOT ACCOUNTABLE TO THE LAWS OF THE TERRITORY FOR AN ACT DONE IN THE COURSE OF HIS ASSIGNED DUTY AND IS ANSWERABLE ONLY IN THE COURTS OF THE UNITED STATES. THIS IS THE RULE EVEN THOUGH THERE MAY BE CONCURRENT JURISDICTION AND THE ACT COMPLAINED OF VIOLATED THE LAWS OF THE TERRITORY AS WELL AS THE MILITARY CODE.

The Executive branch of the government is unable, without express authority by law or treaty, to deliver a soldier or civilian to a foreign government for trial such as is sought to be done here and the Executive branch of the government has no inherent power to do so. Youngstown Sheet & Metal Co. v. Sawyer, 343 U.S. 579; Tucker v. Alexandroff, 183 U.S. 424; Geofroy v. Riggs, 133 U.S. 258; Whitney v. Robertson, 124 U.S. 190.

In Tucker v. Alexandroff supra, it was said: "In Moore on Extradition (Sec. 408), it is laid down as a general proposition that, in the absence of a treaty, the surrender of deserting seamen cannot be granted by the authorities of the United States; and an opinion of Attorney General Cushing (6 Op. 148), is cited upon that point. There is also another to the same effect (6 Op. 209). It is believed that in all the instances which arose between the United States and Great Britain prior to the treaty of 1892 for the reclamation of deserting seamen, both powers have taken the position that in the absence of a treaty there can be no reclamation. Several instances of this kind are cited by Mr. Moore in his treatise."

Power to make laws for the government of our armed forces is in Congress. Dyner v. Hoover, 20 How. 78. The President cannot, by order, directive or other arrangement change a law which Congress enacted for the trial of persons in the Armed Forces. Swain v. U.S., 28 Court of Claims 173, 165 U.S. 553; Talbott v. U.S., 215 Fed. 2nd 22, reversed on other grounds 350 U.S. 11. This rule necessarily precludes the President from taking any action with respect to with-

drawal or enlargement of Court-Martial Jurisdiction 6 Opinions Attorney General 11.

On May 5, 1940, the Congress of the United States, acting within its constitutional perogative, enacted the Uniform Code of Military Justice designed to govern the Armed Forces of the United States. It is specifically stated therein under Article V that the "code shall be applicable in all places" meaning all parts of the world and the Executive branch of the government is without power to vary the terms of that code by administrative agreements, protocol or in any other manner and the executive is without power to deliver up, for convenience or otherwise, any citizen of the United States to any foreign government for trial without the express mandate of the Congress. Valentine v. U. S., 299 U.S. 5; Artukovic v. Boyle, 107 Fed. Supp. 11; Schachtman v. Dulles, 222 Fed 2nd 938.

Any person acting in the course of duty as an agent of the United States is accountable only to United States Federal jurisdiction for any alleged unlawful act, civil or criminal. Cunningham Sheriff v. Neagle, 135 U.S. 1; 65 American Law Reports 733.

The same rule is applicable to persons in military service and it is not limited to domestic cases only. The rule is that any person in the military service of the United States is not accountable to the sovereign laws of any area for an act done in the course of his assigned duty and is answerable only in the courts of the United States. (A courts-martial is a court of the United States.) Other nations apply the same principle and it has recognition in international law. The rule is as above stated even though there may be concurrent jurisdiction and the act complained of violative of both the laws of the territory and the military code. Brown v. Cain, 56 Fed. Supp. 56; In Re Fair, 100 Fed. 149; U. S. Ex Rel Drury v. Lewis, 200 U.S. 1; United States v. Lipsett, 156 Fed. 65; In Re Wulzen, 235 Fed. 362; In Re Delgato, 57 Fed. Supp. 460; Colorado v. Maxwell, 125 Fed. Supp. 18; 135 A.L.R. 10; 153 A.L.R. 1342 and 151 A.L.R. 1463.

It was said in State v. Smith, (Oregon) 16 ALR 124 and in United States v. Daniels, 279 Fed. 844, that the military tribunals of the United States is a Federal tribunal and is given authority to determine any case over which it has jurisdiction. A Federal court, however, is duty bound on a petition for a Writ of Habeas Corpus to make the original determination as to whether or not the individual involved, military or civilian, was acting for and on behalf of the United States at the time of the occurrence of the offense charged. In this case it is so stipulated.

POINT IV. NO CITIZEN OF THE UNITED STATES MAY BE DELIVERED OR SURRENDERED BY THE AUTHORITY OF THE UNITED STATES TO ANY FOREIGN GOVERNMENT FOR TRIAL OF AN ALLEGED OFFENSE UNLESS A VALID TREATY OF EXTRADITION SO DIRECTS.

Extradition may be defined as the surrender by one nation or state to another of an individual accused of an offense within the territorial jurisdiction of the latter, which, being competent to try and punish demands the surrender. Terlinder v. Ames, 184 U.S. 270; Fitzpatrick v. Williams, (C.C.A. 5th) 46 F. 2d 40.

The right of one independent government to demand and receive from another the custody of an offender rests solely on the existence of treaty stipulations between them. U. S. v. Rauscher, 119 U.S. 407; Artukovic v. Boyle, 107 Fed. Supp. 11.

While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender an accused and it may be under a moral duty to do so, the legal right to demand him and the correlative duty to surrender him to the demanding country exists only when created by treaty. Valentine v. United States, 299 U.S. 5; Factor v. Laubenheimer, 290 U.S. 276; United States v. Rauscher, 119 U.S. 407.

In the absence of an extradition treaty, directing that a person be surrendered, the executive has no power to turn him over to a foreign government since no discretionary power exists. Valentine v. United States, 299 U.S. 5 (Opinion by Chief Justice Hughes).

Referring to the surrender power, the court, speaking through Chief Justice Teaney in the case of Holmes v. Jeneson, 14 Pet. 569, said, "In the United States, the general opinion has been, and practice has been in accordance with it, that in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." Moore on Extradition, Vol. 1, Page 21; Vogt, Foreign Relations 1873 Pet 1, Page 81.

The construction of an extradition treaty is for the courts and they are not bound by the construction placed thereon by the executive or by the construction placed thereon by the foreign country with whom the treaty is made. Ex parte Charlton, 185 F. 880, affirmed Charlton v. Kelley, 229 U.S. 447. The same is true of the administrative agreement and protocol in this case. The Defense Department was without power to waive away any right which affected Girard because (1) there was no express authority to do so in the agreement, (2) no procedure was provided, or (3) to do so would be in contravention of the legal meaning of the words "line of duty" in the protocol, (4) political reasons or rules of expediency are not laws and (5) the persons acting on behalf of the Defense Department acted beyond the scope of their agency. See hearing before Senate sub-committee of Armed Forces Committee held on June 5, 1957 (Ex. 1).

A foreign government has no right to demand of the government of the United States a surrender of a citizen or subject of such foreign government, who has committed a crime in his own country and is afterward found within the limits of the United States. Such right has no existence without, and can only be secured by, a treaty stipulation. Ex Parte Dos Santos, Federal case 4,016, reported in 2 Brock. 493.

The United States Government has never acknowledged the right of foreign nations to demand the surrender of fugitives from justice, independent of Treaty stipulation. In re: Fitter, 1852, 23 N.J. Law 311, 57 Am. Dec. 382.

The President would not be justified in directing the surrender of a person in order that he may be brought to trial in the country where he is supposed to have committed an offense, when ther is no stipulation by Treaty between the two governments for the mutual delivery of fugitives. 1831, 2 Op. Atty. Gen. 452.

In re. Vogt, For. Rel. 1873, part 1, pg. 81 - the Acting Secretary of State, Mr. J. C. B. Davis, noted that

"The authority of the executive to abridge personal liberties within the jurisdiction of the United States, and to surrender a fugitive from justice in order that he may be taken away from their jurisdiction is derived from the Statutes of Congress, which confer that power only in cases where the United States are bound by Treaty to surrender such fugitive, and have a reciprocal right to claim similar surrender from another power." Re. Vogt, For. Rel. 1873 part 1, pg. 81.

It may be regarded as settled doctrine, that in the United States, the extradition of fugitives from the justice from foreign countries is a subject within the exclusive control of the National Government under its constitutional power of conducting foreign intercourse and making Treaties. Moore on Extradition, Vol. 1, pg. 53.

The steps which the Respondents contend vested power in them to deliver Girard to a foreign government, based on a purely political decision, are outlined and discussed in Exhibit V attached.

POINT V. WHETHER A CITIZEN OF THE UNITED STATES, CIVILIAN OR MILITARY MAY BE DELIVERED TO A FOREIGN GOVERNMENT FOR TRIAL UNDER PROVISIONS OF AN EXTRADITION TREATY OR AN EXECUTIVE AGREEMENT IS A MATTER FOR JUDICIAL DETERMINATION IN A FEDERAL COURT OF THE UNITED STATES.

The Act of Congress defining the procedure in extradition cases confers no power on the executive to surrender any person to a foreign government where no extradition treaty or convention provides for such surrender. Under extradition statutes and Treaties, the examining court must determine as to the commission of an offense and whether it comes within the treaty provision and thereafter the matter is certified to the Secretary of State for such action as the executive department may consider appropriate. In re Lucke 20 F. supp. 685; Artukovic v. Boyle, supra; Heely v. Hentel, 180 U.S. 109.

Jurisdiction of proceedings preliminary to final executive action to transfer an accused to a foreign country is vested by statute in and only in the Justices of the United States Courts, a Supreme Court Judge, (In re: Keene's Extradition, 6 F Supp. 308), a United States Circuit Judge, 18 U.S.C.A. Section 651, a United States District Judge, Bernstein vs Gross, (C. C.A. Tex.) 58 F. 2d 154, or a Commissioner expressly authorized to act by a court of the United States, 18 U.S.C.A. Section 3184. The employees of the State or Defense Departments are not vested with any authority by law nor are they so vested by the documents upon which reliance is placed in this case. See opinion of the Judge Advocate General (JAGA 1950/3124) attached as Exhibit IV wherein it was held that a U. S. soldier may not be returned by the Executive or the military to Panama for an offense allegedly committed there. (Ex. IV)

POINT VI. THE FACT THAT PETITIONER MAY OR MAY NOT RECEIVE A "FAIR TRIAL" BEFORE A JAPANESE COURT IS NOT MATERIAL TO ANY ISSUE IN THIS CASE.

The argument that Petitioner would receive a fair trial in a Japanese Court begs the issue and does not satisfy the requirements of due process. The bare assertion that such trial would be a fair one proves nothing. Admittedly, constitutional safeguards of substantive law, evidence and procedure would not be available to the Petitioner in a Japanese Court.

It is asserted by the respondents that a few rights have been agreed upon with the Japanese Government, but what happens if they are not followed? One of those rights involve the right of an accused to counsel of his own choice. In this very case, that right has been denied if reports appearing in the public press are correct. The Japanese attorney who the Petitioner does not want as his counsel, has stated publicly that Girard had no choice and that even if he were discharged, the Court would reappoint him. Does this constitute a right to have counsel of one's own choice?

The several basic rights to which respondents refer are empty and meaningless when detached from our whole body of law and procedure. What about the right to trial by jury or its constitutional equivalent - the right to trial by a body of non-legally trained military persons; or the right against double jeopardy; the right to remain silent without any adverse inference being drawn; to protection from cruel and unusual punishment; to apply for Presidential pardon; to the presumption of innocence; to no ex post facto laws; to no unreasonable search; to habeas corpus; to proof of guilt beyond a reasonable doubt; to preliminary showing of probable cause, and a host of others?

All the rhetoric and high sounding language cannot change the fact that a trial in a Japanese court is not the same as a trial in an American Tribunal, and our courts have so stated.

United States Supreme Court Justice Clark, in his opinion in the recent Reid case, said:

"It is clear that trial before an American court-martial in which the fundamentals of due process are observed is preferable to leaving American servicement and their dependents to the widely varying standards of justice in foreign courts throughout the world."

The Court of Military Appeals in U.S. v. Chas. F. Burney, No. 7750 decided March 30, 1956, at p. 38 said:

"It was the intent of founders of our Constitution to insure basic

guarantees of due process to each citizen. Treaties are the law of the land as well as statutes, and surely Congress and the Executive have not done anything inconsistent with that intent by providing trial by military tribunal for civilians overseas, for Constitutional safeguards are far more likely to be extended to United States citizens in a trial by court-martial than in a trial in a foreign court. The courts of foreign sovereigns, especially in civil law countries, are bound to follow traditions which are foreign to American standards of due process of law. Far better it is for an American accused to be tried by American court-martial, where he is entitled to representation, liberal rules of evidence, a presumption of innocence, and thorough review, than to be brought before a French, or Japanese, or German, or Moroccan, or even English civil court. In addition, because we are a nation of civilian soldiers, sailors, and airmen, many of the persons who now serve as court-martial members are the selfsame individuals who previously served on grand and petit juries, and their views of justice do not change with their garb.

"We think we may safely assert that American citizens would prefer trial by an American court-martial to a proceeding in a foreign tribunal if their wishes were to be given any consideration in the matter. Certainly that statement is true if any lesson can be drawn from the desires voiced by American servicement overseas.

In the Congressional Record, February 20, 1956, p. A1552, appears the following:

'Congressman Frank J. Becker, New York, visited American servicemen imprisoned in foreign jails. He concluded that the protection of the United States Constitution has been taken away from these citizens serving us overseas by the Status of Forces Treaty. These are the GI's who have been tried and convicted in foreign courts and are now serving sentences in foreign prisons.

'These imprisoned in France and England were visited. All the GI's in England said that they would have preferred to be tried by Army or Air Force court martial. They felt that they would have had a much fairer trial and would have preferred to have an American officer defend them, even if they would have received more severe penalties from United States authorities. This was the rule before the Status of Forces Treaty.

'In France, a man is guilty until proven innocent; under our Constitution, a man is presumed innocent and must be proven guilty. All but one GI

would have preferred the court martial to prosecution in the French courts. Their trials were conducted in French; in two cases the French lawyers could not speak English.'" (Underscoring supplied.)

See also concurring opinion of Chief Justice Quinn in the Burney case, where he said the following at page 41:

"At the outset, it is important to repeat what I said at the beginning of my dissenting opinion in United States v. Sutton, 3 USCMA 220, 228, 11 CMR 220: 'I have absolutely no doubt in my mind that accused persons in the military service of the Nation are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself.' Consequently, in my opinion, there is no merit to the argument that the Constitution has no application outside the continental limits of the United States. The cases cited in support of that argument deal with the general question of the territorial application of the Constitution. Hawaii v. Mankichi, 190 U.S. 197, 23 S. Ct. 787, 47 L. ed. 1016; Downes v. Bidwell, 182 U.S. 244, 21 S. Ct. 770, 45 L. ed. 1088; or with the practical inapplicability of specific provisions of the Constitution to 'residents or temporary sojourners abroad.' Ross v. McIntyre, 140 U.S. 453, 464, 11 S. Ct. 897, 35 L. ed. 581. Our armed forces are now stationed in 63 foreign countries, as part of our program of national defense and our effort to preserve the peace of the world. They are not thereby deprived of their Constitutional rights and privileges. On the contrary, those Constitutional rights and privileges are a fundamental part of the military law. And the military law governs our armed forces whether they are within or without the continental limits of the United States." (Underscoring supplied.)

C O N C L U S I O N

Predicating authority on vague and nebulous powers allegedly vested in them, the military is attempting to deliver Girard to the Japanese government for trial. They assert that no extradition is necessary and that no judicial hearing may be afforded Girard to determine the propriety of their conduct; that they have the exclusive right to make such political decisions (Par. 7, Respondent's Return); that jurisdiction is a political question under their self-executed agreements and that there must be no breach of the agreement they reached with Japan. Japan, on the other hand, must know that no Agreement or Treaty with the United States is valid without ratification, In Re. Sutherland 53 Fed. 551, and that our law does not permit ratification by implication. The consent of the Senate must be expressed. Taylor, Int. Public Law, Sec. 364.

Power to act is one thing, and the propriety of the exercise of that power is another. Certainly, the military has it within its power to act, regardless of the illegality of its action, but if the so-called administrative Agreement is valid, what would happen in the event Girard was either outside of military power or had returned to the United States? If, as Respondents contend, the Agreement is valid and we must honor it by delivering Girard to the Japanese authorities for trial, they must also argue that they may enter Girard's home in Illinois and remove him therefrom for the delivery of the Japanese authorities. There is nothing in any of the documents which counsel have read making the place of seizure a determining factor in so far as obligation to return him is concerned.

If he is not entitled to a judicial hearing while in Japan, he is not entitled to a judicial hearing while he is in the United States. That being so, he could be turned over to a foreign government merely on a political decision of the Executive Department. That is the contention of the Respondents in this case and if there is any merit to it, the Soviet Gestapo system begins to loom mild by comparison.

It is incredible to counsel that any officer of the United States would assert before a court of the United States that a man's rights may be determined by a political decision of the Executive Branch of this government. But they do not stop there. They say that that political decision is not subject to a judicial review. (Respondent's Answer, Par. 7).

The asserted power under which the Executive may sacrifice the person of

Girard to satisfy Japanese public opinion, must also extend to them the right to whisk Girard out of his native state and country without a judicial hearing to carry out such political decision. If it is contended that we are overstating the Respondent's position, then we would ask at what point, territorily, does the power derived from a political decision cease? When Girard is one mile off the coast of Japan? When he is midway over the Pacific Ocean? Or when he touches American soil? To pose these questions points up how utterly untenable the Respondent's contentions are.

In argument, counsel for Petitioner used by way of example the case of the Japanese government making demand for a newspaper man who was accompanying our Armed Forces on the mainland of Japan, and who had written a critical article which the Japanese deemed a violation of their laws of criminal libel. May such a man be delivered to the Japanese authorities upon request? Under the "Protocol" and under the Uniform Code of Military Justice, he is in the same category as Girard. May the long arm of the Army remove him from his home in the United States, in the event the so-called discretionary political decision was made by the military authorities to turn him over to the Japanese government? Under the terms of the documents upon which the government relies, if they are valid, we would have to deliver this newspaper correspondent upon request. All these, and many others are problems which would arise because, as is contended by the Petitioner, certain officials in our government saw fit to overstep the powers allocated under our Constitutional system. Their original Administrative Agreement was unconstitutional and illegal. The subsequent Protocol and additional documents fall in the same category, and the attempt to enforce it in this case is likewise illegal.

As set forth herein and as particularized in the supplemental Memoranda attached hereto as Exhibit III, the Petitioner is accused of an offense defined by an "Agreed View" of a Subcommittee composed of civilian employees of the governments of Japan and the United States of America.

The authorities under which they claim the power to define the offense is derived from the "Agreed Minutes" of a purported "Protocol", or preliminary Agreement reached with an Ambassador of the United States.

This "Protocol", in turn, is now claimed to effect an amendment to an "Administrative Agreement" approved solely by the President on behalf of the United States.

The "Administrative Agreement", in turn, is claimed to have effected an amendment of the "Security Treaty" entered into between Japan and the United

States with the concurrence of the required two-thirds of the Senate of the United States.

This successive claim of self-investiture of authority for promulgating "Treaty law" under which citizens of the United States may be forcibly removed to foreign courts for trial in violation of their most fundamental constitutional rights, and denied access to their own courts on the ground of unlimited and uncontrolled "political" power, is a replication of the "Fuhrer Princip" of the Nazi Regime. It differs from Hitler's assumption of absolute political power in only one respect. Whereas he grabbed unlimited power under the single "Enabling Statute" of 1933, the power here grabbed is by the more subtle Soviet technique of "little by little". The end result is the same -- absolute dictatorship unless the judicial power intervenes now before it is too late.

"Power corrupts - Absolute power corrupts absolutely."

The guilt or innocence of Girard is not an issue in the present proceedings, just as the question of the fairness of a trial before the Japanese court is not an issue. Certainly our own courts are fully competent to dispense justice under our system of law and in the event of guilt mete appropriate punishment. The issue is squarely whether the political decision made in this case is right or wrong under law and the rule of law.

It is accordingly respectfully requested that the application herein be granted.

In the event the Court determines adversely to the Petitioner, it is respectfully requested that the Stay contained in the Order to Show Cause be continued, so as to give the Petitioner an opportunity for review in the higher Court. The request is made because it is feared that there will be immediate delivery of the person of Girard to the Japanese authorities which may result in making this litigation moot and make it impossible to appeal to our higher courts for decision on these important legal questions. It is obvious that a return of Petitioner from the Japanese authorities could not be obtained short of war, in the event they refused to release him and continued adament in their demands on his person.

Respectfully submitted,

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Attorneys for Petitioner

In the hearing before the sub-committee of the committee on Armed Services, United States Senate, reference the William S Girard case held on June 5, 1957, the following appears: "Senator Ervin - Under the Japanese interpretation, it would seem to me, it is a rather strict interpretation. In other words, the question of whether an offense arose out of any act or omission performed in the performance of official duty if the Japanese position is correct on that, it would seem to me it would be virtually impossible for the United States to have primary jurisdiction under this second category of concurrent jurisdiction because the offense would have to be authorized, and it is extremely unlikely that a superior officer of an American serviceman would specifically either expressly or impliedly authorize him to commit a crime.

Mr. Dechert - I think that is not necessarily so, sir. Suppose this woman had come rushing up at the machine gun. He wasn't specifically authorized to shoot her (having no ball ammunition), but he was directed to protect the machine gun. Though under such presumed facts he might have been using more force than was appropriate under the circumstances, I think he would still clearly be in the performance of his duty in that hypothetical case.....

After our people had continued for 5 weeks to press the view that in this case he was in the performance of duty, the request for instructions came back. The instructions were given that they should continue to press for the performance of duty concept and for our primary jurisdiction, but since this matter must be resolved and since the trial had already been long delayed, they were instructed that if further efforts resulted only in a deadlock, they were authorized to file the kind of waiver which the Japanese had filed in these 97 1/2 percent of the cases in which they had admitted primary negotiations. They continued to negotiate in this Joint Committee - the representatives of the Far East Command

EXHIBIT I

as our American representative, and the State Department through the Embassy in Tokyo had someone there as an observer. This was carried on in negotiations for another 3 weeks, but it finally became impossible to resolve the matter, and in the meantime the furor in the Japanese papers was still continuing and the man was untried. The issue then arose as to what should be done.

It was therefore decided that without withdrawing our certificate a waiver would be made in favor of trial by the Japanese, it having been already stated that Japan would indict him for the least possible offense, which is "death as a result of wounding," as stated in the official statement.

.....

Senator Ervin. - How old was Girard?

Mr. Dechert - Girard is about 21.

Senator Ervin - Well, now the Commanding Officer came to the conclusion that this offense or alleged offense arose out of an act or omission done by him in the performance of his official duty.

Mr. Dechert - The Commanding Officer's certificate has never been withdrawn.

Senator Ervin - And his representative on the Joint Committee took the same view.

Mr. Dechert - And that has never been withdrawn.

Senator Ervin. - And that was referred to the Defense Department.

Mr. Dechert - And the final decision to allow Japan to try really relates back to the Defense Department.

Senator Ervin - The Defense Department came to the same conclusion, however, didn't it, as the Commanding Officer and the American representative on the Joint Committee?

Mr. Dechert - They were acting, I think, on instructions from the Defense Department, so it could not be said that they would independently have taken this action. They were continuing to press

for the position that he was in performance of his duty and that we should conduct the trial, but there had been a deadlock which continued from the 12th of March until about the 12th of May, 2 whole months and in the meantime Girard was in restraint and the Japanese situation was becoming more and more inflamed, and, as I said, the Japanese had indicated that they would try him for the least possible offense.

.....

Senator Ervin - To put this question perhaps another way. I notice in the press release that was issued jointly by the Department of Defense and the Department of State, so this decision reached was a joint decision of the State Department.

Mr. Dechert - The initial decision I have indicated was not a joint decision, it was a decision of the Defense Department. However, as indicated, the State Department was fully informed from the beginning as to what was going on and they had official representatives of the American Embassy attending all those Joint Committee deadlocked meetings as an observer.

Senator Ervin - I was rather astounded by the statement in the joint statement which follows.

Mr. Dechert - The fact that it was a joint statement, you mean?

Senator Ervin - No, I am not astounded by that. It is this statement in one of these statements on page 3:

> Department of Defense instructions were accordingly issued through the Department of the Army to the Far East Command to the effect that the United States representative on the Joint Committee should continue to press the claim for jurisdiction but that in case of continued deadlock he was authorized to waive jurisdiction to Japan.

In other words, that means to me, you insist on maintaining our position unless the other side refuses to accede to it, then agree to their position.

Mr. Dechert - In effect what happened was this: They had had a deadlock for a month and they asked what they should do

thereafter. They were told to keep on trying, because we would like to have this established if we can, but if this is going to result in an overlong delay, with Girard still untried and this matter still inflaming the public, then we authorize you to do this.

(Discussion off the record.)

Senator Flanders - There was an alternative to the action taken and that was to refer the matter to the two Governments.

Mr. Dechert - That's right. Under the provision of the treaty it could have been referred to the two governments. That was not done--and the reasoning behind its not being done was that in effect it was the two Governments that had been negotiating during this long period, and such a reference would result in a still further postponement of the trial and still further inflammation of the situation in Japan.

Senator Flanders - That would seem to have been a decision within the jurisdiction of the State Department rather than within the jurisdiction of the Army.

Mr. Dechert - The jurisdiction of the Defense Department.

Senator Flanders - Of the Defense Department?

.....

Senator Ervin - I would seriously question that article III, the article of the Security Treaty which merely provides this substance that there should be the disposition of the forces, American forces in and about Japan should be determined by an Administrative Agreement.

I seriously question whether that authorized these gentlemen's agreements about jurisdiction over crimes, because that would refer to the placing of where soldiers would be stationed.

.....

Senator Ervin - Are you able to shed any light on the role of the State Department in the matter of reaching this decision?

Mr. Dechert - Mr. Raymond of the State Department is here, but I think I have fairly stated the fact that they had no part in the decision itself as to what to instruct the Far East Command, but on the other hand they were thoroughly informed about all the circumstances from the beginning.

.....

Senator Ervin - I seriously question the validity of the Administrative Agreement, the validity of the Protocol, the validity of the agreed official minutes and the validity of the agreed views on the grounds that I do not think that article III--I wouldn't go so strong as to say I do not think--but I seriously doubt the sufficiency of article III of the treaty to authorize the making of these subsequent agreement . . . . . .

.....

Senator Ervin - I can appreciate the difficulty and the delicacy of the situation but I don't believe the fact that it may be a worldwide pattern--I seriously question whether that would justify our position because we are operating under a written Constitution that says treaties must be ratified by the Senate and I have a conviction that agreements which foreign countries of any substantial nature ought to be under the Constitution--ought to be embodied in the Treaty or at least expressly authorized by the Treaty.

I want to thank you for appearing before the committee and the very complete and very frank exposition of the situation you have given us.

.....

THE ARMED FORCES OF THE UNITED STATES, PASSING THROUGH OR STATIONED IN ANOTHER NATION WITH THAT NATION'S CONSENT, ARE EXEMPT FROM THE CRIMINAL JURISDICTION OF THAT NATION'S COURTS, AND THE UNITED STATES HAS EXCLUSIVE JURISDICTION OVER THE CRIMINAL OFFENSES COMMITTED IN THAT NATION BY MEMBERS OF ITS ARMED FORCES UNDER THE GENERAL RULES OF INTERNATIONAL LAW.

SOVEREIGNTY IS STILL ONE OF THE BASIC TENETS OF INTERNATIONAL LAW AND SIMPLY STATED MEANS THAT EACH INDEPENDENT NATION IS SUPREME WITHIN ITS OWN TERRITORY. (1 HACKWORTH 47, 1 HYDE 340, 1 OPPENHEIM 135). ONE OF THE MOST IMPORTANT ATTRIBUTES OF SOVEREIGNTY IS JURISDICTION OVER ALL PERSONS AND THINGS WITHIN SUCH TERRITORY. (1 HACKWORTH 51, 1 HYDE 319-20, 1 OPPENHEIM 280). RESTRICTIONS UPON THIS JURISDICTION MAY BE IMPOSED BY THE NATION ITSELF, OR MAY BE YIELDED BY THE COMMON CONSENT OF ALL NATIONS. BECAUSE ONE SOVEREIGN NATION CANNOT EXERCISE JURISDICTION OVER ANOTHER SOVEREIGN NATION WITHOUT SUBJECTING SUCH OTHER NATION TO ITS DOMINATION, SEVERAL RESTRICTIONS ON JURISDICTION HAVE BEEN YIELDED BY THE COMMON CONSENT OF ALL NATIONS AND HAVE COME TO BE REGARDED AS RULES OF INTERNATIONAL LAW.

IN DISCUSSING THE PRINCIPLE OF EXTRTERRITORIALITY, ALL WRITERS AGREE WITH HACKWORTH THAT "FOREIGN FRIENDLY SOVEREIGNS, THEIR ACCREDITED DIPLOMATIC REPRESENTATIVES, THEIR ORGANIZED ARMED FORCES WHEN ENTERING OR CROSSING TERRITORY OF THE STATE WITH THE CONSENT OF THE TERRITORIAL SOVEREIGN, AND THEIR PUBLIC VESSELS AND PUBLIC PROPERTY IN THE POSSESSION OF AND DEVOTED TO THE SERVICE OF THE STATE, ARE EXEMPT FROM THE LOCAL JURISDICTION. (2 HACKWORTH 393).

VATTEL, THE FRENCH TEXTWRITER WHO PROBABLY HAD A GREATER INFLUENCE ON THE DEVELOPMENT OF UNITED STATES CONCEPTS OF INTERNATIONAL LAW THAN ANY OTHER PERSON, WROTE IN 1758 THAT:

"THE GRANT OF A RIGHT OF PASSAGE INCLUDES THE GRANT OF WHATEVER IS NATURALLY CONNECTED WITH THE PASSAGE OF TROOPS, AND THOSE THINGS WITHOUT WHICH IT COULD NOT TAKE PLACE, THIS INCLUDES THE RIGHT OF THE BELLIGERANT TO TAKE WITH HIM WHATEVER IS NEEDED BY AN ARMY, THE RIGHT TO EXERCISE MILITARY DISCIPLINE OVER THE SOLDIERS AND OFFICERS, THE PERMISSION TO BUY AT A FAIR

PRICE SUCH THINGS AS THE ARMY MAY REQUIRE, UNLESS *** IT HAS BEEN STIPULATED THAT THE BELLIGERANT IS TO CARRY HIS PROVISIONS WITH HIM ..

(E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (TRANSLATION OF EDITION OF 1758 BY CHARLES G. FENWICK)) WASHINGTON .. 1916, P. 274, 276, SEE ALSO IDEM., PHILADELPHIA, 1817, P. 340-1, 344.)

THIS PRINCIPLE OF INTERNATIONAL LAW WAS ADOPTED BY THE SUPREME COURT OF THE UNITED STATES IN 1812 IN THE SCHOONER EXCHANGE V. MCFADDON ET AL (7 CRANCH 116), AND IT HAS EVER SINCE REMAINED THE BASIC PRINCIPAL OF INTERNATIONAL LAW FOR THE UNITED STATES.. IN THAT CASE, CHIEF JUSTICE MARSHALL, IN DELIVERING THE OPINION OF THE COURT, SAID:

"ONE SOVEREIGN BEING IN NO RESPECT AMENABLE TO ANOTHER AND BEING BOUND BY OBLIGATIONS OF THE HIGHEST CHARACTER NOT TO DEGRADE THE DIGNITY OF HIS NATION, BY PLACING HIMSELF OR ITS SOVEREIGN RIGHTS WITHIN THE JURISDICTION OF ANOTHER, CAN BE SUPPOSED TO ENTER A FOREIGN TERRITORY ONLY UNDER AN EXPRESS LICENSE, OR IN THE CONFIDENCE THAT THE IMMUNITIES BELONGING TO HIS INDEPENDENT SOVEREIGN STATION, THOUGH NOT EXPRESSLY STIPULATED, ARE RESERVED BY IMPLICATION, AND WILL BE EXTENDED TO HIM.

"THIS PERFECT EQUALITY AND ABSOLUTE INDEPENDENCE OF SOVEREIGNS, AND THIS COMMON INTEREST IMPELLING THEM TO MUTUAL INTERCOURSE, AND AN INTERCHANGE OF GOOD OFFICES WITH EACH OTHER, HAVE GIVEN RISE TO A CLASS OF CASES IN WHICH EVERY SOVEREIGN IS UNDERSTOOD TO WAIVE THE EXERCISE OF A PART OF THAT COMPLETE EXCLUSIVE TERRITORIAL JURISDICTION, WHICH HAS BEEN STATED TO BE THE ATTRIBUTE OF EVERY NATION.

WHEATON, WHO WAS THE FIRST AMERICAN TEXTWRITER AND WHO WAS INFLUENCED BY VATTEL, HAS STATED HIS OPINION THAT:

"THE MUNICIPAL INSTITUTIONS OF A STATE MAY ALSO OPERATE BEYOND THE LIMITS OF ITS TERRITORIAL JURISDICTION, IN THE FOLLOWING CASES:

***

3. A FOREIGN ARMY OR FLEET, MARCHING THROUGH, SAILING OVER, OR STATIONED IN THE TERRITORY OF ANOTHER STATE, WITH WHOM THE FOREIGN SOVEREIGN TO WHOM THEY BELONG IS IN AMITY, ARE ALSO, IN LIKE MANNER, EXEMPT FROM CIVIL AND CRIMINAL JURISDICTION OF THE PLACE." (H. WHEATON ELEMENTS OF INTER. LAW ((THE LITERAL REPRODUCTION OF ED. 1866 BY DANA EDITED WITH NOTES BY GEORGE G. WILSON)) LONDON, 1936, P. 128).

SIR ROBERT PHILLIMORE, AN INTERNATIONALLY KNOWN BRITISH WRITER, WHOSE WORKS ARE STILL CONSULTED AND WHO SERVED AS A MEMBER OF QUEEN VICTORIA'S PRIVY COUNCIL AND AS JUDGE OF THE HIGH COURT OF ADMIRALTY, IN HIS COMMENTARIES, STATES:

"IF A FOREIGN ARMY BE PERMITTED TO PASS THROUGH OR BE STATIONED IN, THE TERRITORIES OF ANOTHER STATE, THE PERSONS COMPOSING THAT ARMY, OR BEING WITHIN ITS LINES, ARE ENTITLED TO EXTRATERRITORIAL PRIVILEGES." (SIR ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW ((3RD ED.)), LONDON, 1879, P. 474).

TO THE SAME EFFECT, SEE LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW, VOL. I, PP. 752-760 (CLUNET, "LA PRESENCE DES ALLIES EN FRANCE AT L'EXTERRITORALITE", 514-516, ALINE CHALUFOUR, LE STATUT JURIDIQUE DES TROUPS ALLIES PENDANT LA GUERRE, 1914-1918, P. 15. L. VAN PRAAG, JURISDICTION ET DROIT INTERNATIONAL PUBLIC, SEC. 246. GEORG JUNDERLICH, "DIE GERICHSBARKEIT DER HURESGRUPPE YILDIRIM," MITTEILUNGEN DER DEUTSCHEN GESELLSCHAFT FUR VOLKERRECHT, VOL II, 1932, P. 79 87-89.)

AMONG LATIN AMERICAN NATIONS THE BUSTAMENTE CODE STATES THE LAW CURRENTLY IN FORCE AS FOLLOWS:

ART. 200. NOR ARE THE PENAL LAWS OF THE STATE APPLICABLE TO OFFENSES COMMITTED WITHIN THE FIELD OF MILITARY OPERATIONS WHEN IT AUTHORIZES THE PASSAGE OF AN ARMY OF ANOTHER CONTRACTING STATE THROUGH ITS TERRITORY, EXCEPT OFFENSES NOT LEGALLY CONNECTED WITH SAID ARMY. (FINAL ACT OF THE SIXTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, P. 16.)

THE SAME PRINCIPLE HAS BEEN STATED BY AUTHORITATIVE MODERN AMERICAN WRITERS. BIRKHIMER, WRITING ON MILITARY GOVERNMENT AND MARTIAL LAW, STATES:

IT IS WELL SETTLED THAT A FOREIGN ARMY PERMITTED TO MARCH THROUGH A FRIENDLY COUNTRY, OR TO BE STATIONED IN IT, BY PERMISSION OF ITS GOVERNMENT OR SOVEREIGN, IS EXEMPT FROM THE CIVIL AND CRIMINAL JURISDICTION OF THE PLACE. ***. (BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW, SECTION 114.)

CHARLES CHENEY HYDE, THE GREATEST LIVING AMERICAN WRITER ON INTERNATIONAL LAW SAYS:

STRONG GROUNDS OF CONVENIENCE AND NECESSITY PREVENT THE EXERCISE OF JURISDICTION OVER A FOREIGN ORGANIZED MILITARY FORCE WHICH, WITH THE CONSENT OF THE TERRITORIAL SOVEREIGN, ENTERS ITS DOMAIN. MEMBERS OF THE FORCE

WHO THERE COMMIT OFFENSES ARE DEALT WITH BY THE MILITARY OR OTHER AUTHORITIES OF THE STATE TO WHOSE SERVICE THEY BELONG, UNLESS THE OFFENDERS ARE VOLUNTARILY GIVEN UP. ***." (CHARLES CHENEY HYDE, INTERNATIONAL LAW, ETC., VOL. 1, P. 619, 2D REV. ED.)

ANOTHER LEARNED BRITISH AUTHOR, OPPENHEIM, FORMERLY WHEWELL PROFESSOR OF INTERNATIONAL LAW AT THE UNIVERSITY OF CAMBRIDGE, SAYS (INTERNATIONAL LAW, 4TH ED. VOL. 1, SEC. 445):

> "WHENEVER ARMED FORCES ARE ON A FOREIGN TERRITORY IN THE SERVICE OF THEIR HOME STATE, THEY ARE CONSIDERED EXTRA-TERRITORIAL AND REMAIN, THEREFORE, UNDER ITS JURISDICTION. A CRIME COMMITTED ON FOREIGN TERRITORY BY A MEMBER OF THESE FORCES CANNOT BE PUNISHED BY THE LOCAL CIVIL OR MILITARY AUTHORITIES, BUT ONLY BY THE COMMANDING OFFICER OF THE FORCES OR BY OTHER AUTHORITIES OF THEIR HOME STATE. THIS RULE, HOWEVER, APPLIES ONLY IN CASE THE CRIME IS COMMITTED, EITHER WITHIN THE PLACE WHERE THE FORCE IS STATIONED, OR IN SOME PLACE WHERE THE CRIMINAL WAS ON DUTY; IT DOES NOT APPLY, IF, FOR EXAMPLE, SOLDIERS BELONGING TO A FOREIGN GARRISON OF A FORTRESS LEAVE THE RAYON OF THE FORTRESS, NOT ON DUTY BUT FOR RECREATION AND PLEASURE, AND THEN AND THERE COMMIT A CRIME. THE LOCAL AUTHORITIES ARE IN THAT CASE COMPETENT TO PUNISH THEM."

SO DISTINGUISHED AN ENGLISH LAWYER AS SIR ARNOLD MCNAIR HAS SAID (LEGAL EFFECTS OF WAR, CAMBRIDGE, ENGLAND, 1944, PG 357)

> "UNLESS THE LAWS OF THE ALLIED COUNTRY LIMIT THE VALIDITY OF GOVERNMENTAL ACTS TO THOSE DONE UPON THE TERRITORY OF THAT COUNTRY OR A PARTICULAR PORTION OF IT, IT IS SUBMITTED THAT IT IS IMMATERIAL IN AN ENGLISH COURT WHERE THE OFFICIAL ACT IS DONE - BE IT IN THE HOME TERRITORY OR BE IT ON BRITISH TERRITORY WHEREON HIS MAJESTY HAS CONSENTED TO THE ESTABLISHMENT OF THE ALLIED GOVERNMENT AND THE EXERCISE OF ITS GOVERNMENTAL FUNCTION." (UNDERSCORING SUPPLIED)

AMERICAN AUTHORITIES. THE SAME PRINCIPLE HAS BEEN STATED BY AUTHORITATIVE AMERICAN WRITERS. IN BIRKHIMER ON MILITARY GOVERNMENT AND MARTIAL LAW, SECTION 114, THE LEARNED AUTHOR SAYS: ****

> "IT IS WELL SETTLED THAT A FOREIGN ARMY PERMITTED TO MARCH THROUGH A FRIENDLY COUNTRY, OR TO BE STATIONED IN IT, BY PERMISSION OF ITS GOVERNMENT OR SOVEREIGN, IS EXEMPT FROM THE CIVIL AND CRIMINAL JURISDICTION OF THE PLACE.***

IN AN EXHAUSTIVE ARTICLE ON THE SUBJECT BY COLONEL ARCHIBALD KING (JURISDICTION OVER FRIENDLY FOREIGN ARMED FORCES, 36 AMERICAN JOURNAL OF INTERNATIONAL LAW, 547), IT IS CONCLUDED THAT IN INTERNATIONAL LAW, "PERMISSION BY ONE NATION FOR THE TROOPS OF ANOTHER TO ENTER OR REMAIN IN THE FORMER'S TERRITORY CARRIES WITH IT EXTRATERRITORIALITY, AN EXEMPTION OF THE TROOPS IN QUESTION FROM THE COURTS OF THE COUNTRY AND A PERMISSION FOR THE OPERATION OF THE COURTS MARTIAL OF THE VISITING ARMY." ANOTHER AUTHORITY, THE RENOWNED PROFESSOR JOHN H. WIGMORE, TAKES THE SAME POSITION

IN HIS ARTICLE "THE EXTRATERRITORIALITY OF THE UNITED STATES ARMED FORCES ABROAD." (29 AMERICAN BAR ASSOCIATION JOURNAL, 121).

IN A MORE RECENT CASE, HEWITT V. SPEYE, (250 FED 367, 371) THE DOCTRINE WAS THUS FORCIBLY STATED -

> WE TAKE THE PRINCIPLE TO BE INCONTROVERTIBLE ***, THAT OUR COURTS, NOT ONLY WILL NOT ADJUDICATE UPON THE VALIDITY OF THE ACTS OF A FOREIGN NATION PERFORMED IN ITS SOVEREIGN CAPACITY, BUT ALSO THAT PERSONS INVOLVED IN THE PERFORMANCE OF SUCH ACTS CAN NOT BE SUBJECTED TO A CIVIL LIABILITY THEREFOR.

FROM THE FOREGOING IT IS APPARENT THAT THERE IS SUFFICIENT AUTHORITY OF BOTH AMERICAN AND BRITISH COURT DECISIONS TO ESTABLISH AS SETTLED LAW THE PRINCIPLE THAT AN OFFICER OR EMPLOYEE OF ANY GOVERNMENT PERFORMING OFFICIAL DUTIES ON THE SOIL OF ANOTHER COUNTRY WITH ITS CONSENT OR AID IS NOT BE LIABLE TO SUIT IN THE COURTS OF THE LATTER COUNTRY ON ACCOUNT OF THE PERFORMANCE OF OFFICIAL ACTS.

JAGA 1950/3124 2 May 1950

MEMORANDUM FOR JAGO FILES

SUBJECT: Extradition of American Soldiers to Panama

1. Reference is made to the informal request of Lieutenant General M. B. Ridgeway, Deputy Chief of Staff for Administration, for answer to the following question:

Is the United States, pursuant to any treaty with Panama or otherwise, obligated to turn over to Panamanian authorities a United States' soldier who has committed armed robbery in the Republic of Panama and for whose return the Republic of Panama has asked?

2. It would appear from the facts presented that two American soldiers stationed in the Canal Zone committed armed robbery in the Republic of Panama. Each was tried by general court-martial in the Canal Zone and sentenced to ten years imprisonment ordered to be served in the United States. The Panamanian Government has requested their return to that country.

3. Articles 1, 2, and 5 of the Treaty between the United States and Panama for the mutual extradition of criminals signed 25 May 1904 (Treaty Series 445) provide:

"Article I.

The Government of the United States and the Government of the Republic of Panama mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes and offenses specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime or offense had been there committed.

"Article II.

Extraction shall be granted for the following crimes and offenses:-

* * *

3. Robbery, defined to be the act of feloniously and forcibly taking from the person or another money, goods, documents or other property by violence or putting him in fear; Burgulary.

"* * *

"Article V.

Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this Treaty."

Title 18, U.S.C., section 3184, sets out the procedure to be followed in implementation of an extradition treaty, in the following language:

"Whenever there is a treaty or convention for extradition between the United States and any Foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes

provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

The act of 24 August 1912 (37 Stat. 569, 48 U.S.C. 1330) provides in pertinent part:

"All laws and treaties relating to the extradition of persons accused of crime in force in the United States, to the extent that they may not be in conflict with or superseded by any special treaty entered into between the United States and the Republic of Panama with respect to the Canal Zone, and all laws relating to the rendition of fugitives from justice as between the several States and Territories of the United States, shall extend to and be considered in force in the Canal Zone, and for such purposes and such purposes only the Canal Zone shall be considered and treated as an organized Territory of the United States."

The act of 5 July 1932 (47 Stat. 574; 48 U.S.C. 1330a, b) is related to the question presented. It provides for the extradition of United States' citizens from the Canal Zone to the Republic of Panama in part as follows:

"Sec. 1. That all persons who have been condemned, prosecuted or accused before the courts of the Republic of Panama as authors or accomplices of crimes, transgressions, or offenses against the laws of said Republic, who seek refuge in the Canal Zone, shall be, upon apprehension, taken into custody by the authorities of the Canal Zone and delivered to the authorities of the Republic of Panama, upon the demand of the Government of that Republic and compliance with the procedure herein prescribed.

"Sec. 2. The government of the Canal Zone is at liberty to decline compliance with a demand of the Government of the Republic of Panama for the arrest and delivery to the authorities of said Republic of a fugitive from the justice of the Republic of Panama when said fugitive is a citizen of the United States. The discretion reserved shall be exercised by the Governor of the Panama Canal.

"* * *"

That act is not for application under the submitted facts.

4. Extradition is the delivery of an individual to the state on whose territory he is alleged to have committed, or to have been convicted of, a crime by the state on whose territory the alleged criminal is found (1 Oppenheim, International Law, 7th Ed., 635; 2 Hyde, International Law 1012). The object of extradition can be any individual, whether he is a citizen of the prosecuting state, of the state which is requested to extradite him, or of a third state (Oppenheim, op. cit., 638).

In 1936 the United States Supreme Court in the case of Valentine v. United States ex rel. Neidecker (299 U.S. 5) considered a case involving the extradition to France of two native-born citizens of the United States who were charged with the commission of crimes in France which were among the extraditable offenses specified in the extradition treaty with France. They fled to the United States and were arrested in New York City on the request of the French authorities under a warrant issued by the United States Commissioner. They were held for extradition but by writs of habeas corpus they challenged the jurisdiction of the commissioner on the ground that because they were citizens of the United States, the President had no constitutional authority to surrender them to the French Republic. Article V of the extradition Treaty with France upon which they relied was similar in language to Article V of the extradition treaty with Panama, supra. In arriving at a decision in this case the Supreme Court stated that the President had no power to extradite fugitive criminals except where such power is conferred by treaty or by act of Congress. The court expressed the view that the Act of 6 June 1900 (31 Stat. 656; formerly 18 U.S.C. 651; now reenacted as 18 U.S.C. 3184, supra) defining the procedure to be followed in extradition cases confers no power upon the President to surrender any person to a foreign government where no extradition convention or treaty provides for such surrender. The court stated that Article V of the treaty with France was "explicit in the denial of any obligation to surrender citizens of the asylum state --". "Neither of the contracting Parties shall be bound to deliver up its own citizens." The court held that as Article V provides that there shall be no obligation on the part of either party to deliver up its own citizens, the latter are necessarily excepted from the agreement in Article I and from the class of "person" therein described. The effect is precisely the same as though Article I had read that the two governments "mutually agree to deliver up persons except its own citizens or subjects." As citizens of the United States are excepted from the provisions of the extradition treaty with France, no grant to the President of discretionary power to surrender citizens of the United States can be implied from anything in the treaty. Accordingly, the President would have no power to extradite the two soldiers to Panama.

5. Accordingly, it was concluded and General Ridgeway was so informed on 24 April 1950 by Colonel Connally that the United States is under no obligation, pursuant to treaty or otherwise, to turn over to Panama American soldiers, citizens of the United States, who have committed the offense of armed robbery in the Republic of Panama.

6. A representative of this office (Maj. Downey, Ext. 3523) informally inquired of a representative of the Department of Justice (Mr. M. D. Kiefer, Ext. 523) concerning the practice of the United States in relation to such extradition procedures. Mr. Kiefer stated that the practice is dependent to a very large degree on the country requesting extradition. He stated that no extraditions are ever made to Mexico, and that in his opinion, under the facts stated above, the United States was under no obligation to surrender the soldiers to Panama. Attempt was made to contact Mr. Frederick Divens (Code 191, Ext. 5547) of the Department of State to whom such a question would be referred, but because of his absence information could not be secured from that source.

* * * * * * * * * * *

EXHIBIT V

The steps which the Respondents contend vested power in them to deliver Gerard to a foreign nation based on a purely political decision, are as follows:

FIRST STEP

The Security Treaty between the United States of America and Japan (T.I.A.S. 2491; 3 UST 3329) was signed on behalf of the United States by Dean Acheson, John Foster Dulles, Alexander Wiley, and Styles Bridges on September 8, 1951. It became effective on April 28, 1952. (See William S. Girard Case, Page 6, Hearings before Subcommittee of United States Senate Armed Services Committee held June 5, 1957.

Its principal purpose was to provide that the United States of America should maintain armed forces of its own in and about Japan so as to deter armed attack upon Japan (See Preface). It granted to the United States the right to dispose United States Military Forces in and about Japan (Article 1). It went on to provide for further implementation of this right as follows:

> "The conditions which shall govern the disposition of Armed Forces of the United States of America in and about Japan shall be determined by Administrative Agreement between the two governments." (Article III ..

SECOND STEP

An Administrative Agreement purporting to be signed under the authority of Article III of the Security Treaty (T.I.A.S. 2492; 3 UST 3341) was signed on behalf of the United States by Earl Johnson and Dean Rusk on February 28, 1952, and became effective on April 28, 1952. The signing was specifically authorized by the President of the United States. (Statement of Department of State, Hearings on H. J. Res. 309 and Similar Measures before the House Committee on Foreign Affairs, 84th Cong., 1st Sess., Pt.2, At P. 55.) (See William S. Girard Case, Hearings before Subcommittee of United States Senate Armed Services Committee held June 5, 1957, P.6).

At the time of the execution and the effectiveness of both of these instruments, the United States had exclusive jurisdiction over both its military and civilian personnel and its bases and other military areas reserved for military operations.

Article XVII of the Administrative Agreement suggests the United States to conclude with Japan an Agreement on criminal jurisdiction similar

to the provisions of the NATO Status of Forces Agreement.

There is nothing in the language of the Security Treaty that either expressly or impliedly authorize the inclusion of this part of Article XVII of the Administrative Agreement dealing with the Status of the troops. The words "the conditions which shall govern the disposition" which was to be made the subject of further Administrative Agreements were limited to the subject matter of the arrangement of them. The word "disposition" in this context is defined in Webster's Collegiate Dictionary, Fifth Edition, as follows:

> "The ordering or arranging of anything, or the state of being arranged, esp. systematically; as the disposition of draperies; the disposition of troops."

While this document is termed an "Administrative Agreement", it is in fact an Executive Agreement which in its essence purports to transfer sovereignty over citizens and property of the United States and to agree to the extradition of citizens of the United States to a foreign nation to whom such jurisdiction has been transferred. Its effect is to invade the long established Treaty making province and power provided for in the Constitution.

Since a Treaty is by nature a compact between sovereignties and when executed is a part of the municipal law of the land, it logically follows that a treaty is to be construed on principles similar to those applied to other written contracts and statutes, and the cognate Rules of International Law and of the legislation of the government may be considered. (52 Am. Jr. 822)

Santovincenzo v. Egan, 284 US 30, 76 L. Ed. 151, 52 S.Ct. 91; The Pizarro, 2 Wheat. (U.S.) 227, 4 L. Ed. 226; Tashiro v. Jordan, 201 Cal. 236, 256 p. 545, 53 Alr. 1279, Affirmed . 278 U.S. 123, 73 L. Ed. 214, 49 S. Ct. 47; Re. Ghio, 157 Cal. 552, 108 p. 516, 37 L.R.A. (N.S.) 549, 137 Am. St. Rep. 145, Affirmed in 223 U.S. 317, 56 L.Ed. 453, 32 S.Ct. 267; Re Anderson, 166 Iowa 617, 147 N.W. 1098, 52 L.R.A. (N.S.) 656, Affirmed in Etersen v. Iowa, 245 U.S. 170, 62 L. Ed. 225, 38 S.Ct. 109; Hamilton v. Erie R. Co. 219 N.Y. 343, 114 N.E. 399, Ann. Cas. 1918A 928, Writ of Error Dismissed in 248, U.S. 369, 63 L. Ed. 307, 39 S. Ct. 95; Trott v. State, 41 N.D. 614, 171 N.W. 827, 4 A.L.R. 1372.

The Agreement between the parties to the North Atlantic Treaty regarding the status of their forces (T.I.A.S. 2846; 4 U.S.T 1792) became effective

on August 3, 1953, between the United States and Belgium, France, The Netherlands, and Norway.

THIRD STEP.

Thereafter, in compliance with requests by Japanese authorities for fulfillment of the purported commitment contained in Article XVII, the Amendment of Article XVII of the Administrative Agreement under Article III of the Security Treaty (T.I.A.S. 2848; 4 UST 1846), which Amendment purportedly established the present criminal jurisdiction formula based on that contained in the NATO Status of Forces Agreement, was on September 29, 1953, signed by John M. Allison, United States Ambassador to Japan, on behalf of the United States. It entered into force in October 29, 1953.

This purported further Amendment of the Security Treaty is entitled "Protocol to Amend Article XVII of the Administrative Agreement Under Article III of the Security Treaty Between United States and Japan."

Black's Law Dictionary, Third Edition, defines "Protocol" as follows:

> "The first draft or rough minutes of an instrument or transaction; the original copy of a dispatch, Treaty, or other document. Brande. A document serving as the preliminary to, or opening of, any diplomatic transaction."

This purports to relinquish the complete criminal jurisdiction in Japan of United States over its personnel there and to transfer jurisdiction over all civilian personnel and certain military personnel to Japan. It further purports to transfer primary jurisdiction to Japan of certain offenses of military personnel.

There is no evidence in the record that this Agreement was either authorized or approved by the President of the United States and it is admitted that it was never submitted to the Senate for its concurrence in accordance with the requirements of Article II, Section 2, of the United States Constitution.

Even though credulity was strained to a point of interpreting Article III of the Security Treaty so as to construe this section as authorizing the further amendment thereof to include the transfer of jurisdiction of United States over its citizens and military personnel to Japan, this document could not affect such an Amendment to the Security Treaty.

The obligations of a Treaty cannot be changed or varied except by the same formalities by which they were introduced, or at least by some act of as high an import and of as unequivocal an authority. (52 Am. Jur. 812).

The Amiable Isabella, 6 Wheat, (US) 1, 5 L. Ed. 191.

The pertinent part of this so-called Protocol is contained in Article XVII, Paragraph 3, which provides as follows:

"3. In cases where the right to exercise jurisdiction is concurrent the following Rules shall apply:

"(A) The Military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States Armed Forces or the civilian component in relation to

"(1) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States Armed Forces or the civilian component or of a dependent;

"(11) offenses arising out of any act or omission done in the performance of official duty.

"(B) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

"(C) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other state as soon as practicable. The authorities of the state having the primary right shall give sympathetic consideration to a request from the authorities of the other state for a waiver of its right in cases where that other state considers such waiver to be of particular importance."

FOURTH STEP

On the same date September 29, 1953, John M. Allison, Ambassador Extraordinary and Plenipotentiary of the United States of America, signed a further document entitled "Agreed Official Minutes Regarding Protocol To Amend Article XVII of the Administrative Agreement Between the United States of America and Japan."

Where a member of the United States Armed Forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that the alleged offenses, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings be sufficient evidence of the fact unless the contrary is proved. The above statement shall not be interpreted to prejudice

in any way Article 318 of the Japanese Code of Criminal Procedure. (Re. Paragraph 3 (A) (ii).

Article XXVI of the aforementioned Administrative Agreement contains the further pertinent provision.

"1. A joint Committee shall be established as the means for consultation between the United States and Japan on all matters requiring mutual consultation regarding the implementation of this Agreement. In particular, the Joint Committee shall serve as the means for consultation in determining the facilities and areas in Japan which are required for the use of the United States in carrying out the purpose stated in Article I of the Security Treaty.

"2. The Joint Committee shall be composed of a representative of the United States and of Japan, each of whom shall have one or more Deputies and a staff. The Joint Committee shall determine its own procedures, and arrange for such auxiliary organs and administrative services as may be required. The Joint Committee shall be so organized that it may meet immediately at any time at the request of the representative of either the United States or Japan.

"3. If the Joint Committee is unable to resolve any matter, it shall refer that matter to the respective governments for further consideration through appropriate channels."

There are only two members of the Joint Committee. One is selected by the Commanding General of the Far East Command as his representative and the other is the representative of the Japanese Government itself. They have a staff who sit with them, but the Joint Committee consists of only two men.

FIFTH STEP

Purporting to act pursuant to the authority vested in them under and by virtue of Article XXVI of the Administrative Agreement, the two members of the Joint Committee promulgated certain "Agreed Views" which are numbered 39 and 43, respectively, both of which relate to the matter of "official duty" and to the certificate of the Commanding Officer of the alleged offender.

Both of these so-called views were approved October 29, 1953, and are as follows:

"No. 39. The term 'Official Duty' as referred to in Paragraph 3(A) (ii) of the Protocol and Official Minutes relating thereto is understood to be any duty or service required or authorized to be done by Statute, Regulation, the Order of a superior or military usage.

"No. 43. The Certificate referred to in the Official Minutes relating to Paragraph 3(A) (ii) of the Protocol will be forwarded, upon request, by the

Commanding Officer of the alleged offender to the Chief Procurator of the District in which an offense arises. Ordinarily such request will be made immediately upon notification of arrest, and only in the uncommon case in which the question of official duty status becomes an issue. The foregoing will not preclude the forwarding of such Certificate in any event. This Certificate will be sufficient evidence of the fact of official duty status unless the contrary is proved. Any proof to the contrary shall be presented to the Joint Committee for consideration.

"Where it is considered by the Chief Procurator that such proof exists, immediate notification will be given to the Commanding Officer who issued the Certificate. Thereafter, notification will be given to the Commanding Officer within ten days as to whether or not the issue will be submitted to the Joint Committee, in order that final disposition of the case may not be unduly delayed. Any submission of such matters to the Joint Committee will be made expeditiously in every case." (See William S. Girard Case, pp. 18 and 19).

The invalidity of the last two steps in this five-stage self-investure of authority is too apparent to require comment.

It is under the purported amended language of the Agreed View that the Japanese claim for jurisdiction over the Petitioner is based. The reasoning of this claimed jurisdiction is set out in the testimony of Robert Dechert, General Counsel, Department of Defense, which is summarized as follows: The Japanese Authority claim that Japanese witnesses to the events of January 30, 1957, on the Weir Camp Maneuver Area have stated that the deceased woman, among a number of Japanese civilians, was enticed to approach the guard position of the Petitioner by reason of the fact that he had thrown out empty shell cases which they were picking up to re-sell for salvage and that he then wilfully and wantonly fired upon these Japanese civilians, thus causing the death of the deceased.

Mr. Dechert states:

"...Fundamentally, the Japanese claim was that although they admitted that he was on duty nevertheless a person who is on duty status may so far depart from the relation to his duty that he can't be considered on duty any longer. They said that Girard had gone outside his duty and in some cases they used harder words than that although in no case did they indicate that they thought he intended to hit the woman.

"They have used words like 'wilful' and 'wanton' and that kind of thing. They said that his acts were completely foreign to the duty that was assigned to him, of protecting the equipment, and they said that he enticed them on and then fired on them, and that such behavior was not duty at all, but that it was something else, even though officially he was on duty."

On the other hand, the Petitioner denies these allegations and asserts that he fired from the waist intending only to frighten the Japanese civilians and that the empty shell cartridge propelled from his gun merely for the purpose of making a noise, accidentally struck the deceased.

In a separate Affidavit of Robert Dechert, he admits the facts supporting Petitioner's claim that the area was under the exclusive jurisdiction of the military forces of the United States at the time of the incident. (See Affidavit of Robert Dechert, on file in this Court.)

The deceased and approximately thirty other Japanese civilians were trespassing on United States Government property with the intent of stealing or misappropriating United States Government property. The Petitioner was on guard duty under instructions to protect such property at the time of the incident under penalty of Court Martial for failing to do so. (Uniform Code of Military Justice, Articles 83 - 96).

Petitioner's Commanding Officer executed a Certificate as to official duty with the local Japanese authority which is quoted below. This Certificate was addressed and filed with the Chief Procurator, Maebashi District, Maebashi City, Honshu, Japan, on February 7, 1957.

> "...On 30 January 1957, 2nd Battalion, 8th Cavalry Regiment, was engaged in routine training at Camp Weir Range Area. Company F was conducting blank firing exercises. Specialist Third Class William S. Girard was instructed by his Platoon Leader to move near a position near an unguarded machine gun to guard the machine gun and items of field equipment that were in the immediate area. Girard, following instructions, moved to the designated position near the machine gun. While performing his duties as guard, he fired an expended cartridge case, as a warning, which struck and killed Sakai, Naka, Kami-Shinden, Somamura, Gumma Prefecture, who had entered the range area for the purpose of gathering expended cartridge cases.
>
> "2. The United States will exercise jurisdiction in this case, unless notification is given immediately that proof to the contrary exists.
>
> "3. Should this incident result in trial of the above individual by General Court-Martial, you will be notified of the date of trial in accordance with the provisions of Paragraph 45 of the above-mentioned Agreed Views."

Although under the language of the first paragraph of Paragraph 3 (f) (ii) of the Agreed Official Minutes No. 3, it was provided that this Certificate was sufficient evidence of the fact that the alleged offense arose out of an

act or omission done in the performance of official duty. The Japanese claim that the 2nd Paragraph of that provision rendered such language nugatory because Article 318 of the Japanese Code of Criminal Procedure provided in effect "The probative value of evidence shall be left to the free discretion of Judges." (See Testimony of Mr. Dechert, Page 16, Girard Case) .

Mr. Dechert in his testimony in the Girard Case before the United States Senate Committee, Pages 13 and 14, states the position taken by the Japanese authority in this instance to be as follows:

"Article 318 of the Japanese Code of Criminal Procedure says that the Judge shall be the final decider of facts. The Japanese interpret this as meaning that if a dispute arises as to the correction of the Certificate, by an attempt to prove the contrary by the Japanese, the final resolution of the fact as to whether the Certificate is right or the proof to the contrary is right must be made under Article 318 of the Japanese Code of Criminal Procedure by the local Japanese Court, acting through its judge.

"Senator ERVIN. It looks to me like that would give final say-so to the Japanese.

"Mr. DECHERT. The only step that would seem to prevent that is the thing which I read a few minutes ago from the Administrative Agreement, Article XXVI, Subsection 3, which says:

> 'If the Joint Committee is unable to resolve any matter, it shall refer that matter to the respective governments for further consideration through appropriate channels.'

"Conceivably such a negotiation between governments might go on so long that it would never reach the Japanese courts. But the Japanese have contended that the meaning of this Agreed Minute is exactly what you, sir, the Chairman, have just indicated.

"Senator ERVIN. It would seem to me that they have a reasonable basis for it, because that is subsequent to the original Agreement, and it would be perhaps construed to be a modification."

The Japanese claim to determine the issue of whether or not the petitioner acted within the scope of his guard duty is based upon the language contained in Paragraph 3(a) (ii) of the Protocol of September 9, 1953, which provides:

> "(ii) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States Armed Forces or the civilian component in relation to

"(ii) offenses arising out of any act or omission done in the performance of official duty."

as amended by the language contained in the document entitled "Agreed View", as previously set forth

This purported Amendment to the Protocol is the predicate upon which the Japanese claim is based. (See Testimony of Mr. Dechert, Girard Case pp. 16 to 22)

The provisions of Agreed View No. 43 have the effect of depriving the Petitioner of having the question of whether or not his act was done in performance of his duty as a soldier in the United States Military Army.

The provisions of Article XXVI, Par. 3, of the Administrative Agreement of February 28, 1952, and of Agreed View No. 43 of the Joint Committee, therein referred to, have the effect of depriving the Petitioner of his right to determine whether or not the act complained of justifiably arose out of or was in the course of his duty assignment.

The Petitioner has an inalienable right as a citizen of the United States to have this question determined by the Government of the United States through its courts and to deprive him of this right is a violation of the United States Constitution. This Constitutional right to have such an issue determined by the Government of the United States is protected as to both civil or criminal prosecution.

"A civil or criminal prosecution in a court of a state of the United States against a member of the Armed Forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the Armed Forces thereof, or under the law of War, may at any time before the trial or final hearing thereof be removed for trial into the District Court of the United States for the District where it is pending in the manner prescribed by law, and it shall thereupon be entered on the Docket of the District Court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine the cause." Added Aug. 10, 1956, c, 1041, par. 19 (A) 70A Stat. 626. (Par. 1442A, Judiciary - Procedure)

When even the states of the United States are prohibited from determining such an issue, it is no answer to say that assurances have been obtained from Japan or any other foreign nation as to the fundamental safeguards for a fair trial. The issue is not the fairness or unfairness of foreign court. The issue is that a citizen of the United States, acting as an Agent of the United States, in the performance of his duty to the United States, has both the logical and inalienable legal right to have the issue as to whether or not any act performed by him under claim of authority of the United States determined in the courts of the United States and those courts alone. (Fifth Amendment, Constitution)